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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 581.

DAVID BROWN, APPELLANT,

vs.

Ethan A. Hitchcock,
~~CORNELIUS N. BLISS,~~ SECRETARY OF THE INTERIOR.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED OCTOBER 31, 1898.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

In the Court of Appeals of the District of Columbia

DAVID BROWN, Appellant,
vs.
CORNELIUS N. BLISS, Secretary of the Interior. } No. 826.

a Supreme Court of the District of Columbia.

DAVID BROWN
vs.
CORNELIUS N. BLISS, Secretary of the Interior. } No. 19363. In Equity.

UNITED STATES OF AMERICA,
District of Columbia, } *ss:*

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Bill in Equity.*

Filed May 10, 1898.

In the Supreme Court of the District of Columbia, the 10th Day of May, A. D. 1898.

DAVID BROWN, Plaintiff,
vs.
CORNELIUS N. BLISS, Secretary of the Interior, Defendant. } Number 19363, Equity Docket 44.

To the supreme court of the District of Columbia, holding an equity court:

The plaintiff states as follows:

1. He is a citizen of the State of California and resides at the city of San Francisco, in said State of California, and brings this suit in his own right.

2. The defendant is a citizen of the United States and a resident of the District of Columbia, and is the Secretary of the Interior of the United States, and is sued in this action as such Secretary of the Interior.

3. That, as plaintiff is informed and believes, in accordance with the provisions of the act of the Congress of the United States entitled "An act to enable the State of Arkansas and other States to

reclaim the swamp lands within their limits," and approved the 28th day of September, A. D. 1850, and in pursuance of the provisions of the act of the Congress of the United States entitled "An act to extend the provisions of 'An act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits' to Minnesota and Oregon, and for other purposes," and ap-
2 proved the 12th day of March, A. D. 1860, and within the time limited by the second section of said last-mentioned act, the State of Oregon selected certain lands, including the lands hereinafter described, as swamp and overflowed lands, made unfit thereby for cultivation, and granted to said State by the terms of the acts aforesaid.

4. That, as plaintiff is informed and believes, said selection of said lands was examined by the Secretary of the Interior, and the said Secretary of the Interior, then Mr. Henry M. Teller, adjudged and determined that certain of said lands so selected, including the lands hereinafter described, were swamp and overflowed lands, made unfit thereby for cultivation, within the meaning of the acts aforesaid; that the same remained unsold at the times of the passage of the acts aforesaid, and that the same did not include any lands which the Government of the United States had reserved, sold, or disposed of in pursuance of any law enacted before the passage of the act last hereinbefore mentioned; and then and there, on the 16th day of September, A. D. 1882, the said Secretary of the Interior, Mr. Henry M. Teller, made out an accurate list and plats of the lands so adjudged and determined by him to be swamp and overflowed lands, as aforesaid, and transmitted the same to the governor of the State of Oregon, which list was denominated and will hereinafter be referred to as "list number 5."

5. That thereafter, as plaintiff is informed and believes, on the 5th day of March, A. D. 1885, the said Henry M. Teller ceased to be the Secretary of the Interior, and on said day Mr. Lucius Q. C. Lamar was appointed the Secretary of the Interior in his place.

3 6. That, as plaintiff is informed and believes, up to and at the time that the said Henry M. Teller ceased to be the said Secretary of the Interior and at the time that the said Lucius Q. C. Lamar assumed the duties of said office there were not and had not been any settlers on any of the lands hereinafter described and so included in said "list number 5" nor any claimants thereto other than the State of Oregon and its assignees as hereinafter stated, nor were there nor had there been pending before the said Secretary of the Interior or before the Land Department of the United States any proceeding or proceedings whatever for the annulment, cancel-ation, or suspension of the said "list number 5" or for the revocation, alteration, or modification of the said determination and judgment of the Secretary of the Interior approving said list and adjudging and determining that the lands therein contained were swamp and overflowed lands within the meaning of the acts aforesaid, nor any proceeding or proceedings in any way affecting the lands hereinafter described.

7. That on the 26th day of July, A. D. 1880, one H. C. Owen purchased from the State of Oregon certain of the lands so described in said "list number 5," which lands so purchased by the said H. C. Owen are situated in the county of Harney, State of Oregon, and are described as follows:

The southeast quarter and the east half of the northeast quarter of section twelve, the south half of the northeast quarter of section thirteen, the southeast quarter of the northeast quarter and the east half of the southeast quarter of section fourteen, the east half of section twenty-three, the south half of the northwest quarter, the southwest quarter, the west half of the southeast quarter, and the southeast quarter of the southeast quarter of section twenty-four; all in township twenty-five south, range thirty-one east, of
4 Willamette meridian.

The north half of the southwest quarter and the northwest quarter of the southeast quarter of section eight, the south half of the south half of section nineteen, the south half of the south half of section twenty, the southeast quarter of the southwest quarter and the south half of the southeast quarter of section twenty-one, the south half of the south half of section twenty-two, the southeast quarter of the northwest quarter and the west half of the west half of section twenty-six, lots two and four of section twenty-six, the southwest quarter of the northeast quarter, the east half of the northeast quarter, the southeast quarter, and the southwest quarter of the southwest quarter of section twenty-seven; the northwest quarter of the northeast quarter, the north half of the northwest quarter, and the south half of the southeast quarter of section twenty-eight; the north half of the northeast quarter of section twenty-nine, the south half of the southwest quarter and the southeast quarter of section thirty-two, all of section thirty-three, all of section thirty-four, all of section thirty-five; all in township twenty-five south, range thirty-two east, of Willamette meridian.

The southeast quarter of section one, the south half of section three, the south half of the southeast quarter of section four, the east half of section nine, all of section ten, the northeast quarter of section twelve, all of section fifteen, the north half of the northeast quarter, the southeast quarter of the northeast quarter, the north half of the northwest quarter, the southeast quarter of the northwest quarter, the south half of the southwest quarter, and the
5 southeast quarter of section seventeen; the north half of section twenty-one, the north half and the northeast quarter of the southeast quarter of section twenty-two, the southwest quarter of section twenty-three; all in township twenty-six south, range thirty-one east, of Willamette meridian.

Lots one, two, three, and four of section four, all of fractional section five, the fractional south half of the southwest quarter and the east half of section six; all in township twenty-six south, range thirty-two east, of Willamette meridian.

8. That thereafter, by divers mesne conveyances, the title of the said H. C. Owen to the lands aforesaid vested in this plaintiff, and on the 4th day of April, A. D. 1898, the State of Oregon, in pur-

suance of said sale and conveyances, made, executed, and delivered to this plaintiff its patent, in due form of law, under the seal of said State, for the lands aforesaid.

9. That, as plaintiff is informed and believes, on the 6th day of December, A. D. 1887, the said Lucius Q. C. Lamar ceased to be said Secretary of the Interior, and Mr. William F. Vilas was appointed and became Secretary of the Interior in his stead.

10. That, as plaintiff is informed and believes, on the 27th day of December, A. D. 1888, the said Secretary of the Interior, then the said William F. Vilas, made and entered an order annulling, canceling, and revoking the said "list number 5" and the approval thereof, and annulling and revoking the said judgment and determination so made by his said predecessor in said office, the said Henry M. Teller, whereby his said predecessor had adjudged and determined that the lands aforesaid were swamp and over-
6 flowed lands within the meaning of the acts aforesaid, and made and entered an order purporting to adjudge and determine that certain of the lands described in said "list number 5," including the lands hereinbefore described, were not swamp and overflowed lands within the meaning of the acts aforesaid.

11. That thereafter, as plaintiff is informed and believes, divers proceedings were taken before the said Secretary of the Interior and in the General Land Office of the United States by the State of Oregon and by the grantors of this plaintiff to set aside and have held for naught the orders and rulings so made by the said William F. Vilas as such Secretary of the Interior, which proceedings came to an end within one year last past.

12. That, as plaintiff is informed and believes, since the said proceedings last aforesaid came to an end, the defendant, as such Secretary of the Interior, is proceeding to put in force and to carry out the orders and rulings so as aforesaid made by the said William F. Vilas as such Secretary of the Interior and to hold the lands hereinbefore described to be public lands of the United States and subject to entry under the laws of the United States, and threatens and intends to receive and permit the officers of the Land Department of the United States to receive applications for and allow entries of the lands aforesaid as public lands of the United States.

13. The plaintiff is advised and believes that upon the approval and transmission of the said "list number 5" by the said Henry M. Teller as such Secretary of the Interior—that is, on the 16th day of September, A. D. 1882, or before that time—the title to said lands vested in fee in the State of Oregon and its assignees as afore-
7 said, so that thereafter it was not within the power of the then Secretary of the Interior or of any of his successors in office or of any officer of the Government of the United States effectively to revoke such approval or to revoke or annul the orders, rulings, and determinations made in that behalf by the said Henry M. Teller as such Secretary of the Interior, or to injuriously affect the rights of the State of Oregon or of its assignees or of this plaintiff to the lands aforesaid.

14. That, as plaintiff is informed and believes, the execution of

the said order of the 27th day of December, A. D. 1888, so made by the said William F. Vilas as such Secretary of the Interior, will throw a cloud upon the title of this plaintiff to the lands aforesaid, and is likely to cause many persons to attempt to settle upon the said lands and to enter the same in the Land Department of the United States as public lands of the United States subject to such entry, and that plaintiff will be unable to remove such persons from said lands or to quiet his title thereto as against them without a multiplicity of suits, and that therefore this plaintiff is entitled in this court to an order enjoining and restraining the defendant, as such Secretary of the Interior, and his subordinate officers of the Land Department of the United States, from in any way carrying said last-mentioned orders and rulings into effect, and from permitting any entries upon said lands or holding the same open to entry, and from in any way interfering with or embarrassing the plaintiff in his title and ownership of the lands aforesaid.

15. That, as plaintiff is informed and believes, the value of the said lands hereinbefore described is the sum of twenty thousand dollars ($20,000.00) and upwards.

8 Wherefore plaintiff prays:

First. That the said order of December 27th, A. D. 1888, so far as the same may relate to or purport to affect the lands of the plaintiff hereinbefore described, be canceled and annulled by this court and declared to be void and of no effect.

Second. That it may please the court to grant to the plaintiff a writ of injunction restraining the defendant and his subordinate officers of the Land Department of the United States from executing or in any way carrying into effect the said order of the 27th day of December, A. D. 1888, and from holding the lands aforesaid or any thereof to be public lands of the United States, or subject to entry as such, and from receiving or acting upon any applications or entries for the same or any part thereof, and from in any way interfering with or molesting the plaintiff in his title to and enjoyment of the lands aforesaid.

Third. For such other and further relief as may be agreeable to equity and good conscience.

Fourth. That it may please the court to grant unto the plaintiff a writ of subpœna to be directed to the said Cornelius N. Bliss, as such Secretary of the Interior, commanding him, at a certain time and under a certain penalty therein to be limited, personally to appear before this honorable court, and then and there upon his oath full, true, direct, and perfect answer make to all and singular the premises, and, further, to stand to, perform, and abide such further order, direction, and decree therein as to this honorable court shall seem agreeable to equity and good conscience.

DAVID BROWN, *Plaintiff.*

9 STATE OF CALIFORNIA, } ss:
City and County of San Francisco, }

Now comes David Brown, the plaintiff above named, and, being duly sworn, says:

I am the plaintiff in the above-entitled action; I do solemnly swear that I have read the foregoing bill by me subscribed and know the contents thereof, and that the facts therein stated upon my personal knowledge are true and those stated upon information and belief I believe to be true.

DAVID BROWN.

Subscribed and sworn to before me this 23rd day of April, A. D. 1898.

[SEAL.] JAMES L. KING,
Notary Public in and for the City and County of San Francisco, State of California.

In my opinion, upon the instructions given to me and upon the case laid before me, there is good ground for the foregoing suit in the manner in which it is framed.

CHARLES A. KEIGWIN,
Solicitor for Plaintiff.

10 *Demurrer to Bill.*

Filed June 10, 1898.

In the Supreme Court of the District of Columbia.

DAVID BROWN, Plaintiff,
vs.
CORNELIUS N. BLISS, Secretary of the Interior, Defendant.
} No. 19363, Equity Docket 44.

The demurrer of Cornelius N. Bliss, Secretary of the Interior, defendant, to the bill of complaint of David Brown, the above-named plaintiff.

This defendant, by protestation, not confessing any or all of the matters and things in the plaintiff's bill of complaint contained to be true in such manner and form as the same *is* therein set forth and alleged, doth demur to said bill, and for cause of demurrer showeth that the said bill doth not contain any matter of equity whereon this court can ground a decree or give to the plaintiff any relief against this defendant.

Wherefore, and for divers other good causes of demurrer appearing in the said bill, the defendant doth demur thereto and humbly demands the judgment of this court whether he shall be compelled to make any further or other answer to the said bill, and prays to be hence dismissed with his costs and charges in this behalf most wrongfully sustained.

WILLIS VAN DEVANTER,
Assistant Attorney General, Solicitor and of Counsel for Defendant.

11 I hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law.

WILLIS VAN DEVANTER,
Of Counsel for Defendant.

UNITED STATES OF AMERICA, *District of Columbia,* } ss:

Cornelius N. Bliss, being first duly sworn, deposes and says that he is the Secretary of the Interior of the United States, and as such is the defendant in the above-entitled suit, and that the foregoing demurrer is not interposed for delay.

CORNELIUS N. BLISS.

Sworn to before me this 9th day of June, 1898.

W. BERTRAND ACKER,
Notary Public in and for D. C.

[SEAL.]

12 *Decree.*

Filed Jun- 28, 1898.

In the Supreme Court of the District of Columbia.

DAVID BROWN
vs.
CORNELIUS N. BLISS, Secretary of the Interior. } Equity. No. 19363.

This cause coming on to be heard upon the demurrer interposed by the defendant to the complainant's bill, and the same having been argued by counsel and considered by the court, it is this 28th day of June, A. D. 1898, adjudged, ordered, and decreed—

That the complainant's bill filed herein be, and the same is hereby, dismissed, and his prayer for injunction against the defendant is denied, and from this decree the complainant, by his counsel, here, now, in open court, prays an appeal to the Court of Appeals of the District of Columbia, and the same is allowed to him, and the penalty of the appeal bond is fixed in the sum of $50.00.

W. S. COX, *J.*

O K.
WILLIS VAN DEVANTER, *For Def't.*

13 Filed Jun- 30, 1898. J. R. Young, Clerk.

In the Supreme Court of the District of Columbia.

DAVID BROWN
vs.
CORNELIUS N. BLISS, Secretary of the Interior. } No. 19363. In Equity.

The President of the United States to Cornelius N. Bliss, Secretary of the Interior, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein under and as directed by the rules of said court, pursuant to an appeal entered in the supreme court of the District of Columbia on the 28th day of June, 1898, wherein David Brown is appellant and you are appellee, to show cause, if any there be,

why the decree rendered against the said appellant should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward F. Bingham, chief justice of the supreme court of the District of Columbia, this 28th day of June, in the year of our Lord one thousand eight hundred and ninety-eight.

Seal Supreme Court of the District of Columbia.

JOHN R. YOUNG, *Clerk.*

Service of the above citation accepted this 30th day of June, 1898.

WILLIS VAN DEVANTER,
Attorney for Appellee.

14 *Memorandum.*

June 30, 1898.—Appeal bond filed.

15 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

[Ten-cent U. S. internal-revenue stamp, canceled July 6, '98, J. R. Y.]

I, John R. Young, clerk of the supreme court of the District of Columbia, do hereby certify that the foregoing pages, numbered from 1 to 14, inclusive, are true copies of originals in cause No. 19363, in equity, wherein David Brown is complainant and Cornelius N. Bliss, Secretary of the Interior, is defendant, as the same remains upon the files and records of said court.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 6th day of July, A. D. 1898.

Seal Supreme Court of the District of Columbia.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 826. David Brown, appellant, *vs.* Cornelius N. Bliss, Secretary of the Interior. Court of Appeals, District of Columbia. Filed Jul- 8, 1898. Robert Willett, clerk.

9 FRIDAY, *October 6th, A. D.* 1898.

DAVID BROWN, Appellant,
vs.
CORNELIUS N. BLISS, Secretary of the Interior. } No. 826.

The argument in the above-entitled cause was commenced by Mr. C. A. Keigwin, attorney for appellant, and was continued by Mr. Assistant Attorney General Van Devanter, attorney for the appellee, and was concluded by Mr. C. A. Keigwin, attorney for the appellant.

10 DAVID BROWN, Appellant,
vs.
CORNELIUS N. BLISS, Secretary of the Interior. } No. 826.

Opinion.

Mr. Chief Justice ALVEY delivered the opinion of the court:

The bill in this case was filed by the appellant to obtain an injunction against Hon. Cornelius N. Bliss, as Secretary of the Department of the Interior, to restrain that official from disposing of certain lands in Harney county, in the State of Oregon, as part of the public lands of the United States. The lands in question are claimed to be a part of the swamp and overflowed lands situated in the State of Oregon and granted to that State by the United States under and by virtue of the act of Congress of September 25, 1850 (9 Stat., 519), and the act of extension of March 12, 1860 (12 Stat., 3); and the appellant sets up and makes claim to the lands described in the bill, under and through the State of Oregon.

The appellee, the defendant below, demurred to the bill, and, upon hearing, the court below sustained the demurrer and dismissed the bill, and from that order this appeal was taken.

The prayer of the bill is, that a certain order made by a preceding Secretary of the Interior, the Hon. William F. Vilas, on the twenty-seventh of December, 1888, so far as the same may relate to or affect the lands described in the bill, may be cancelled and annulled and declared void and of no effect; and that the defendant and his subordinate officers of the Land Department of the United States may be restrained by injunction from executing or in any way carrying into effect the said order of the twenty-seventh of December, 1888, and from holding said lands or any part thereof to be public lands of the United States or subject to entry as such, and from receiving or acting upon any applications or entries for the same or any part thereof, and from in any way interfering with or molesting the plaintiff in the enjoyment of his title to said lands, and for general relief.

The act of Congress of September 28, 1850, ch. 84, is entitled "An act to enable the State of Arkansas and other States to reclaim the 'swamp lands' within their limits," and by that act it is provided

that in each State the whole of the "swamp and overflowed lands, made unfit thereby for cultivation, which shall remain unsold at the passage of this act, shall be, and the same are hereby, granted to said State;" and that it should be the duty of the Secretary of the Interior, as soon as might be practicable, "to make out an accurate list and plats of the lands described as aforesaid, and transmit the same to the governor of the State," and at his request "cause a patent to be issued to the State therefor; and, on that patent, the fee-simple to said lands shall vest in said State, subject to the disposal of the legislature thereof." 9 Stat., 519. And by the act of March 12, 1860, ch. 5, the provisions of the act of 1850 were extended to the State of Oregon, "provided that the grant hereby made shall not include any lands which the Government of the United States may have reserved, sold or disposed of (in pursuance of any law heretofore enacted), prior to the confirmation of title to be made under the authority of said act." 12 Stat., 3.

This is a summary or an abbreviated statement of the provisions of the congressional legislation upon the subject of the swamp and overflowed lands of the United States, located in the several States, as made by the Supreme Court of the United States, in the case of Warner Valley Stock Co. *v.* Smith, 165 U. S., 28, 29, on appeal taken from this court.

The facts of the case are not in any manner complicated, nor are they numerous in detail. The bill alleges that Hon. Henry M. Teller, as Secretary of the Interior, adjudged and determined that the lands in controversy were swamp and overflowed lands enuring to the *the* State of Oregon under the legislation of Congress, and that the said Secretary of the Interior, then and there, on the sixteenth of September, 1882, made out an accurate list and plats of said lands, together with other lands embraced in said determination, and transmitted the same to the governor of the State of Oregon—the list being denominated as "list No. 5."

That said Secretary Teller was succeeded in the Department of the Interior by the Hon. Lucius Q. C. Lamar, March 5, 1885, but up to that time no proceeding whatever had been initiated looking to the vacation or annulment of "list No. 5," or of the action and determination of Secretary Teller, in regard to said lands.

That Secretary Lamar was succeeded in office by the Hon. William F. Vilas, on December 6, 1887, and that, on December 27, 1888, said Vilas, as Secretary, annulled, cancelled and revoked said "list No. 5," and annulled and revoked the determination of his predecessor in office, Secretary Teller, and thereupon himself adjudged and determined that said lands were not swamp and overflowed, within the meaning and intent of the statute.

11 It is further alleged in the bill that after the proceedings just recited, there were divers proceedings taken before the Secretary of the Interior and in the General Land Office, by the State of Oregon, and by the grantors of the plaintiff, to set aside and have held for nought the action and determination of said former Secretary Vilas, which proceedings came to an end within a year before the filing of the present bill, and that the present Secre-

tary of the Interior, the Hon. Cornelius N. Bliss, is proceeding to put in force and carry out the action of the former Secretary Vilas, and hold the lands described in the bill to be public lands of the United States, subject to entry under the laws thereof, relating to the public lands of the Government of the United States.

The plaintiff then proceeds to allege the ground of his claim and pretension, and the principle upon which he seeks relief of the court. He alleges that he is advised and believes that upon the approval and transmission of the said "list No. 5" by the said Teller, as Secretary of the Interior, the title to said lands vested in fee in the State of Oregon and its assignees or grantees, so that thereafter it was not within the power of the then Secretary of the Interior, or of any of his successors in office, or of any officer of the Government of the United States, effectively to revoke such approval, or to revoke or annul the orders, rulings, and determination made in that behalf by the said Secretary Teller, as such Secretary, or to injuriously affect the rights of the State of Oregon, or of its assignees or grantees, or of the plaintiff, to said lands. And further, that the action of the present Secretary casts a cloud upon the title of the plaintiff to the lands, which he has acquired from and through the State of Oregon.

Upon the case thus made by the bill, and admitted by the demurrer, the appellant, the plaintiff below, has sought to maintain two main propositions: First, that the making, approval, and transmission of the "list No. 5" to the governor of the State of Oregon, was a *final decision* by the Secretary of the Interior, the effect of which was to vest in the State the title to the lands in question beyond all further control of the Land Department, notwithstanding that no patent has ever been issued to the State by the Land Department, and which title could be divested only by the judgment of a court. And, second, whatever may be the power of the particular Secretary making the original decision as to the character of the lands, and approving and certifying to the governor of the State the list of such lands, as directed by the statute, that decision was so far final that it could not be reversed or set aside by any successor in office of the Secretary who rendered the decision in the first instance.

The first of these propositions has been considered and decided by this court in the case of Warner Valley Stock Co. *v.* Smith, 9 App. D. C., 187. That case arose under the swamp and overflowed lands act of 1850, and the extension act of 1860, and in which the State of Oregon was the State supposed to have become entitled to the lands there in controversy, by the action of the Land Department of the United States Government. It is conceded by the appellant in this case that the case just referred to does substantially decide the first proposition here presented, though it is thought by counsel that this case is, in some respects, distinguishable from the case reported in 9 App. D. C. We think, however, that, with respect to the first proposition stated, the two cases are without substantial difference. That case was taken by appeal to the Supreme Court of the United States, where, by reason of the resignation from office of Secretary

Smith, the case abated. Warner Valley Stock Co. *v.* Smith, 165 U. S., 28.

But since that case was so disposed of in the Supreme Court, there has been made by that court a decision which would appear to fully embrace and conclude both of the propositions contented for by the appellant in this case, and which would seem to preclude further discussion of the subject. The case in which that decision was made is the case of Michigan Land and Lumber Co. *v.* Rust, 168 U. S., 589. That case, like the present, arose under the swamp and overflowed lands act of 1850, ch. 84; and in that case, as in the present, there had been no patent issued to the State for the lands in controversy; and the principal and leading questions were as to the construction of the act, and the effect of certain proceedings under the act, had and taken by the Secretary of the Interior as the head of the Land Department.

In that case, it was held, in an opinion of the court delivered by Mr. Justice Brewer, that whenever an act of Congress granting lands specifically provides for the issue of a patent, the legal title remains in the Government until such patent is issued, with power to inquire into the extent and validity of rights claimed against the Government; and although a survey had been made of the lands in controversy which indicated that they were swamp lands, it was still within the power of the land office *at any time prior to the issue of a patent* to order a resurvey, and to correct any and all mistakes made in the prior survey and report made to the office. The powers and duties of the Secretary of the Interior, as head of the Land Department, are continuing and coexist with the duration of the legal title to the land in the Government of the United States; and the question as to the particular person who may fill the office of Secretary of the Interior at the time of the action taken that gives rise to the controversy is wholly immaterial. The duty pertains to the office and not to any particular incumbent thereof, as distinguished from his predecessor or successor in office.

In the opinion of the court, in the Michigan Land and Lumber Co. *v.* Rust, just referred to, the court said:

"It will be perceived that the act (act of 1850) contemplated the issue of a patent as the means of transferring the legal title. In Rogers Locomotive Works *v.* American Emigrant Co., 164 U. S., 559, 574, it was said, speaking in reference to this matter, and after a full review of the previous authorities, 'when he,' (that is, the Secretary of the Interior) 'made such identification, then, and not before, the State was entitled to a patent, and on such patent the fee-simple title vested in the State. The State's title was at the outset an inchoate one, and did not become perfect, as of the date of the act, until a patent was issued.'" And, again, in the 12 course of the opinion, it was said: "And in New Orleans *v.* Paine, 147 U. S., 261, the question was presented as to the power of the department to order a new survey, and on page 266 the rule was thus stated: 'If the department was not satisfied with the survey, there was no rule of law standing in the way of its ordering another. Until the matter is closed by final action, the pro-

ceedings of an officer of a department are as much open to review or reversal by himself, *or his successor*, as are the interlocutory decrees of a court open to review upon the final hearing.' So, notwithstanding that a survey had been made, and that such survey indicated that the land in controversy was swamp land, and, therefore, passing under the act of 1850 to the State of Michigan, it was within the power of the Land Department, at any time prior to the issue of a patent, of its own motion, to order a resurvey, and correct by that any mistakes in the prior survey."

In that decision are cited many other decisions maintaining the same principle, and there are many cases in the Land Department to show an established practice there, in accordance with the doctrine so explicitly stated in the Michigan Land and Lumber Co. *v.* Rust, *supra*.

It follows that the decree of the court below must be affirmed; and it is so ordered.

Decree affirmed.

13 TUESDAY, *October* 18*th*, *A. D.* 1898.

DAVID BROWN, Appellant,
vs.
CORNELIUS N. BLISS, Secretary of the Interior. } No. 826. October Term, 1898.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of record from the supreme court of the District of Columbia, and was argued by counsel. On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said supreme court in this cause be, and the same is hereby, affirmed with costs.

Per MR. CHIEF JUSTICE ALVEY.

October 18, 1898.

WEDNESDAY, *October* 19*th*, *A. D.* 1898.

DAVID BROWN, Appellant,
vs.
CORNELIUS N. BLISS, Secretary of the Interior. } No. 826.

On motion of Mr. C. A. Keigwin, attorney for the appellant in the above-entitled cause, it is ordered by the court that said appellant be allowed an appeal to the Supreme Court of the United States on giving bond in the sum of three hundred dollars.

14 Know all men by these presents that we, David Brown, of the city of San Francisco, in the State of California, as principal, and the American Surety Company of New York, of No. 100 Broadway, New York city, State of New York, as surety, are held and firmly bound unto Cornelius N. Bliss, Secretary of the Interior, in the full and just sum of three hundred dollars, to be paid to the said Cornelius N. Bliss, his certain attorney, executors, administra-

tors, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 20th day of October, in the year of our Lord one thousand eight hundred and ninety-eight.

Whereas lately, at a Court of Appeals of the District of Columbia, in a suit depending in said court between the above-named David Brown, appellant, and the above-named Cornelius N. Bliss, Secretary of the Interior, appellee, a decree was rendered against the said David Brown, appellant, and the said David Brown having been allowed an appeal to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said Cornelius N. Bliss, Secretary of the Interior, citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, within 30 days from the date thereof:

Now, the condition of the above obligation is such that if the said David Brown shall prosecute his appeal to effect and answer all costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

DAVID BROWN. [SEAL.]

[Seal of American Surety Company of New York.]

AMERICAN SURETY COMPANY OF NEW YORK, [SEAL.]
By DAVID B. SICKELS, *Vice-president.* [SEAL.]
CORTLANDT S. VAN RENSSELAER, [SEAL.]
Attorney, 49225.

Sealed and delivered in the presence of—

——— ———.

Approved by—
R. H. ALVEY, *Ch. Justice.*

This bond is acceptable.
Oct. 21, 1898.

WILLIS VAN DEVANTER,
Solicitor for Appellee.

15 STATE AND COUNTY OF NEW YORK, *ss:*

On this 20 day of October, 1898, before me personally appeared David B. Sickels, vice-president of the American Surety Company of New York, to me known, who, being by me duly sworn, did depose and say that he resided in the city of New York; that he is the vice-president of the American Surety Company of New York, the corporation described in and which executed the above instrument; that he knew the corporate seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order, and that the liabilities of said corporation do not exceed its assets, as ascertained

in the manner provided by law; and the said David B. Sickels further said that he was acquainted with Cortlandt S. Van Rensselaer and knew him to be one of the attorneys of said corporation; that the signature of said Cortlandt S. Van Rensselaer subscribed to the said instrument is in the genuine handwriting of the said Cortlandt S. Van Rensselaer, and was thereto subscribed by the like order of the said board of directors, and in the presence of him, the said David B. Sickels, vice-president.

[Seal of Notary Public.]

L. E. CARMAN,
Notary Public No. 18, New York County.

At a regular quarterly meeting of the board of trustees of the American Surety Company of New York, held on the 12th day of April, 1893, the following resolution was adopted:

"Resolved, That the president and vice-presidents be, and they hereby are, and each one of them is, authorized and empowered to execute and deliver and attach the seal of the company to any and all bonds and undertakings for or on behalf of the company in its business of guaranteeing the performance of contracts other than insurance policies, and executing or guaranteeing bonds and undertakings required or permitted in all actions or proceedings by law allowed; such guarantee, bonds, and undertakings, however, to be attested in every instance by the secretary, one of the assistant secretaries, or one of the attorneys."

COUNTY OF NEW YORK, *ss:*

I, Cortlandt S. Van Rensselaer, attorney of the American Surety Company of New York, have compared the foregoing resolution with the original thereof as recorded in the minute book of said company, and do certify that the same is a correct and true transcript therefrom and of the whole of said original resolution.

Given under my hand and the seal of the company, at the city of New York, this 20 day of October, 1898.

[Seal of American Surety Company.]

CORTLANDT S. VAN RENSSELAER, *Attorney.*

[Endorsed:] No. 826. David Brown, appellant, *vs.* Cornelius N. Bliss, Sec'y of the Interior. Bond on appeal to Supreme Court U. S. Court of Appeals, District of Columbia. Filed Oct. 21, 1898. Robert Willett, clerk.

16 UNITED STATES OF AMERICA, *ss:*

To Cornelius N. Bliss, Secretary of the Interior, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal, filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein David Brown is appellant and you are appellee, to

show cause, if any there be, why the decree rendered against the appellant should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Richard H. Alvey, Chief Justice of the Court of Appeals of the District of Columbia, this 22d day of October, in the year of our Lord one thousand eight hundred and ninety-eight.

R. H. ALVEY,
Chief Justice of the Court of Appeals of the District of Columbia.

17 [Endorsed:] Oct. 22, 1898. Service of the within citation is hereby accepted. Willis Van Devanter, ass't att'y gen'l, solicitor for appellee. Court of Appeals, District of Columbia. Filed Oct. 24, 1898. Robert Willett, clerk.

18 Court of Appeals of the District of Columbia.

I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 17, inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of David Brown, appellant, *vs.* Cornelius N. Bliss, Secretary of the Interior, No. 826, October term, 1898, as the same remains upon the files and records of said Court of Appeals.

Seal Court of Appeals, District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 28th day of October, A. D. 1898.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

[Ten-cent U. S. internal-revenue stamp, canceled 10, 28, '98, R. W.]

Endorsed on cover: Case No. 17,166. District of Columbia Court of Appeals. Term No., 581. David Brown, appellant, *vs.* Cornelius N. Bliss, Secretary of the Interior. Filed October 31, 1898.

JAN 3 1899
JAMES H. MCKENNEY
Clerk

Motion to advance

Filed Jan. 3, 1899.

In the Supreme Court of the United States.

OCTOBER TERM, 1898.

DAVID BROWN,
Appellant,
v.
CORNELIUS N. BLISS,
Secretary of the Interior.
No. 581.

MOTION TO ADVANCE.

CHARLES A. KEIGWIN,
Solicitor for Appellant.

W. B. TREADWELL,
Of Counsel.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1898.

DAVID BROWN, *Appellant*, v. CORNELIUS N. BLISS, *Secretary of the Interior.*	No. 581.

MOTION TO ADVANCE.

Now comes the appellant in the above entitled cause, and respectfully moves the Court to advance the said cause and to set down the same for hearing at an earlier date than that heretofore fixed.

This case has already, on December 19, 1898, been advanced and is now set for hearing on February 20, 1899. Since that action was taken, it has been announced that the appellee, who is sued in his character as Secretary of the Interior, will retire from office in the latter part of January or early in February, 1899.

As stated in the former motion to advance, the question involved relates to the powers of the Secretary of the Interior in the execution of the swamp land grants, and, by reason of its affecting numerous claims under the said grants, is of great public concern.

The particular ground upon which advancement was before prayed was the liability of the suit to abate in the event of the appellee's retirement from office, and the fact that in such event the opportunity to obtain an adjudication of the important questions involved would be lost.

It is submitted that the same considerations which were held to warrant advancement upon the former motion afford ground for further advancement, and it is prayed that the case be set for hearing on some day prior to the appellee's retirement from office.

CHARLES A. KEIGWIN,
Solicitor for Appellant.

W. B. TREADWELL,
Of Counsel.

December 28, 1898.

I accept service of the above motion and do not ~~approve~~ ~~approved~~ the granting of it.

J. K. RICHARDS.
Solicitor-General.

No. 581.

Motion to substitute

FEB 20 1899
JAMES H. McKENNEY,
Clerk.

Filed Feb. 20, 1899.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1898.

DAVID BROWN,
Appellant,
v.
CORNELIUS N. BLISS,
Secretary of the Interior.
} No. 581.

PETITION THAT SUIT BE CONTINUED AGAINST ETHAN A. HITCHCOCK.

CHARLES A. KEIGWIN,
Solicitor for Appellant.

W. B. TREADWELL,
Of Counsel.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1898.

DAVID BROWN,
Appellant,
v.
CORNELIUS N. BLISS,
Secretary of the Interior.
} No. 581.

PETITION THAT SUIT BE CONTINUED AGAINST ETHAN A. HITCHCOCK.

Now comes the appellant in the above entitled cause, and respectfully represents to the Court that, since the docketing of said cause in this Court, Cornelius N. Bliss, the appellee therein, has resigned the office of Secretary of the Interior, and has ceased to be such officer, and that Ethan A. Hitchcock has been appointed, and has become the Secretary of the Interior, and is now performing the duties of said office.

And said appellant further respectfully represents that said suit was lawfully commenced against the said Cornelius N. Bliss, as such Secretary of the Interior; solely in relation to the discharge of his offical duties; that the same involves the title to certain land, which is claimed

by the appellant as grantee of the State of Oregon, under the swamp land grant, and is claimed by the United States to be public land of the United States, whereby the title of the United States is drawn in question, and that the same, therefore, involves only the question of such conflicting claims of title, and the duties and powers of the Secretary of the Interior with relation thereto.

And said appellant further respectfully represents that, in order to obtain a settlement of the questions so involved, it is necessary that said suit should survive and be maintained against the said Ethan A. Hitchcock as such Secretary of the Interior.

Wherefore, said appellant respectfully prays that this Court require the said Ethan A. Hitchcock to show cause before this Court, at such time as to the Court may seem meet, why the said suit should not survive and be maintained against him as such Secretary of the Interior, and that the Court thereupon order that the said suit do survive and that the same be maintained against the said Ethan A. Hitchcock, as such Secretary of the Interior, with the same effect as if he had been the original defendant therein, in accordance with the provisions of the Act of Congress entitled "An Act to prevent the abatement of certain actions," approved February 8, 1899; but without liability for any costs incurred up to the time of such order, which costs, as against the said Hitchcock, are hereby ~~taxed~~ waived by said appellant.

CHARLES A. KEIGWIN,
Solicitor for Appellant.

W. B. TREADWELL,
Of Counsel.

FILED.
NOV 28 1898
JAMES H. McKENNEY, Clerk

Brief of Keigwin & Treadwell for Appellant.

Filed Nov. 28, 1898.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1898.

DAVID BROWN,
Appellant,
vs.
CORNELIUS N. BLISS,
SECRETARY OF THE INTERIOR,
Appellee.

No. 581.

BRIEF FOR APPELLANT.

CHARLES A. KEIGWIN,
Washington, D. C.,
Solicitor for Appellant.

W. B. TREADWELL,
San Francisco, Cal.,
Of Counsel

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1898.

DAVID BROWN, *Appellant,*

vs.

CORNELIUS N. BLISS, SECRETARY OF THE INTERIOR, *Appellee.*

No.....

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

This is an appeal from a decree of the Court of Appeals of the District of Columbia, affirming the decree of the Supreme Court of the District of Columbia, which sustained a demurrer and dismissed the bill for want of equity. The only question in the case is, therefore, the sufficiency of the bill.

The suit was brought against the defendant, as Secretary of the Interior, to cancel and annul a certain order made by one of his predecessors, as head of the Land Department, so far as the same relates to the lands described in the bill, and to enjoin the defendant from carrying that order into effect. The allegations of the bill are substantially as follows:

Under and in accordance with the Act of Congress of September 28, 1850, "to enable the State of Arkansas and "other States to reclaim the swamp lands within their limits," (9 Stats. 519,) and the Act of March 12, 1860, extending the provisions of the former Act to Minnesota and Oregon, (12 Stats. 3,) the State of Oregon selected certain lands as swamp and overflowed lands, made unfit thereby for cultivation, and granted to that State by the terms of those Acts.

The Secretary of the Interior (then Mr. Henry M. Teller) examined that selection of lands, and "adjudged and deter- "mined that certain of said lands so selected, including the "lands hereinafter described, were swamp and overflowed "lands, made unfit thereby for cultivation, within the mean- "ing of the Acts aforesaid," and that the same were not within any of the exceptions contained in those Acts; and, on September 16, 1882, "made out an accurate list and plats "of the lands so adjudged and determined by him to be swamp "and overflowed lands as aforesaid, and transmitted the same "to the Governor of the State of Oregon; which list was "denominated 'List number 5'."

Mr. Teller thereafter went out of office, leaving the matter in that condition; and there were then no claimants to these lands other than the State of Oregon and its grantees, and no proceeding affecting the land was then pending before him. He was succeeded by Mr. Lucius Q. C. Lamar, and the latter by Mr. William F. Vilas.

On July 26, 1880, one H. C. Owen purchased from the State of Oregon certain of these lands, described in the bill, and, by mesne conveyances, his title vested in the plaintiff, who also holds the patent of the State of Oregon therefor, issued to him as assignee of Owen.

On December 27, 1888, Mr. Vilas, as Secretary of the Interior, made an order "annulling, canceling, and revoking the "said 'List number 5' and the approval thereof, and annulling "and revoking the said judgment and determination so made "by his said predecessor in said office, the said Henry M. "Teller," and made an order "purporting to adjudge and "determine that certain of the lands described in said 'List "number 5', including the lands hereinbefore described, were "not swamp and overflowed lands within the meaning of the "Acts aforesaid."

Various proceedings were thereafter taken by the State and its grantees, before the Secretary of the Interior and in the General Land Office, to secure a reversal of the orders so made by Mr. Vilas, which proceedings came to an end within one year before the filing of the bill. After the termination of those proceedings, the defendant undertook to put in force and carry into effect these orders of Mr. Vilas, and is treating these lands as public lands of the United States and subject to entry as such, and threatens and intends to receive and to permit his subordinates in the Land Department to receive applications for and allow entries of these lands as public lands of the United States.

It is alleged that the effect of the present and intended course of conduct on the part of the defendant will be to cloud plaintiff's title, and to cause many persons to attempt to settle upon and enter these lands, as public lands, and that plaintiff will be unable to remove them or quiet his title against them without a multiplicity of suits.

The prayer of the bill is, first, for a cancelation and annullment of the order of Mr. Vilas, and, second, for an injunction restraining the defendant from executing it or carrying it into

effect, from holding these lands to be public lands or subject to entry, from receiving or acting upon any applications therefor or entries thereon, and from in any way interfering with the plaintiff's title to and enjoyment of the land.

To this bill, the defendant demurred generally for want of equity; which demurrer was sustained by the court and the bill dismissed. That decree was affirmed by the Court of Appeals.

It is, we believe, not disputed that the relief prayed for is appropriate and justified, within the rule laid down in *Noble* v. *Union River Logging R. Co.*, 147 U. S. 165, if the order so made by Mr. Vilas was not within the competence of the Secretary of the Interior. The only question, therefore, presented by the record, is whether it was competent for him, under the circumstances, to cancel his predecessor's listing of these lands, and to revoke the former determination that the lands were swamp lands.

ASSIGNMENTS OF ERROR.

1. The decree appealed from is erroneous, in adjudging that the plaintiff's bill does not contain any matter of equity entitling the plaintiff to relief against the defendant, and in affirming the decree dismissing said bill for that reason.

2. Said decree is erroneous, in this: that it appears from said bill that, by the judgment and determination of the Secretary of the Interior, made on the 16th day of September, 1882, and by his approval of the list and plats containing the lands in suit, and his transmission of the same to the Governor of the State of Oregon, the State of Oregon, and the plaintiff, as its grantee, became the owner, in equity, of the lands in suit, so that thereafter it was not within the power of the Secretary of the Interior or of any officer of the United States, effectively to revoke said judgment, determination, or approval.

3. Said decree is erroneous, in this: that it appears from said bill that the order of the Secretary of the Interior made on the 27th day of December, 1888, was in violation of law and of the rights of the plaintiff, that the enforcement of said order is contrary to equity, and that plaintiff is, in equity, entitled to relief against said order.

4. Said decree is erroneous, in this: that the decree of the Supreme Court of the District of Columbia, thereby affirmed, was erroneous, and should have been reversed.

ARGUMENT.

The question presented in this case depends, for its solution, upon the construction of the Swamp Land Act of September 28, 1850. (9 Stats. 519.) The material portions of that Act are as follows:

"Be it enacted . . . That, to enable the State of Arkansas to construct the necessary levees and drains to reclaim the swamp and overflowed lands therein, the whole of those swamp and overflowed lands, made unfit thereby for cultivation, which shall remain unsold at the passage of this act, shall be, and the same are hereby granted to said State.

"Sec. 2. That it shall be the duty of the Secretary of the Interior, as soon as may be practicable after the passage of this act, to make out an accurate list and plats of the lands described as aforesaid, and transmit the same to the Governor of the State of Arkansas; and, at the request of said Governor, cause a patent to be issued to the State therefor; and, on that patent, the fee simple to said lands shall vest in the said State of Arkansas, subject to the disposal of the Legislature thereof; *provided, however,* That the proceeds of said lands, whether from sale or by direct appropriation in kind, shall be applied, exclusively, as far as necessary, to the purpose of reclaiming said lands by means of the levees and drains aforesaid."

By the subsequent Act of March 12, 1860, (12 Stats. 3,) the provisions of the former Act were extended to Oregon, and that State was required, within a limited time, to make its selections accordingly.

We contend that the effect of these Acts was to grant to the State *in præsenti*, all the lands of the description therein

mentioned; that upon the Secretary of the Interior was imposed the duty of determining what lands were of that description, and of certifying that determination to the State; that, upon such determination and certificate, the *title* to the lands, in equity if not in law, vested in the State as of the date of the grant; and that, therefore, upon the issuance of such certificate, all control of the Secretary of the Interior over the lands so certified, ceased, and there remained in him only the ministerial duty of causing a patent to be issued upon the request of the Governor.

In the recent case of *Michigan Land and Lumber Co.* v. *Rust*, 168 U. S. 589, this Court announced certain views (not necessary to the decision of that case) adverse to our contention; but we respectfully submit that the views there expressed are contrary to the settled course of decision in this Court, which has become a rule of property, and are inconsistent with well-established legal principles.

We shall, before analyzing that case, examine the question in the light of the prior decisions of this Court; but we may here note that the opinion in that case, as to this point, proceeds solely upon that portion of the Act of 1850, which requires the issuance of a patent, and provides that, "on that patent, the fee simple . . . shall vest in" the State. From the use of that language, the Court draws the conclusion that, until a patent has issued, the entire matter remains *in fieri* and within the control of the Land Department,—thus giving no effect whatever to the "listing."

The construction and effect of this Act and of similar Congressional grants, very early engaged the attention of this Court; and the cases on the subject establish certain consistent and unvarying rules. By these decisions, it has been

settled: (1) that the words "shall be and are hereby granted" import a present and operative grant, of a dignity at least equal to that of a patent; (2) that the effect of those words is in no wise modified by a further direction that a patent shall issue, or even that the title shall vest upon such patent; (3) that when the lands granted have been identified by the Secretary, or, in the absence of action by him, by a court, the grant attaches to the land as of the date of the Act; (4) that such identification gives, at least, a vested right to a patent, which is equivalent to a patent issued; and (5) that, in such cases, the Land Department has no further control over the land. We will first examine the decisions on these points, and will then discuss the question on principle.

1. This Act operated as a Present Grant.

In *Railroad Company* v. *Smith*, 9 Wall. 95, the Court said as to this Act:

"Here is a present grant by Congress of certain lands to the States within which they lie, but it is by a description which requires something more than a mere reference to their townships, ranges, and sections, to identify them as coming within it. In this respect it is precisely like the railroad grants, which only become certain by the location of the road. In fact, in this regard the swamp-land grant was the more specific, for all the lands of that description were granted, and they have remained so granted ever since, while no particular land was described by the railroad grant, which was a float, to be determined by the choice of the line of the road in future."

In *Leavenworth &c. R. R. Co.* v. *U. S.*, 92 U. S. 733, 741, the Court, speaking of a grant in aid of a railroad, said:

"It creates an immediate interest, and does not indicate a purpose to give in future. 'There be and is hereby granted' are words of absolute donation, and import a grant *in præsenti*. This court has held that they can have no other meaning; and the land department, on this interpretation of them, has uniformly adminis-

tered every previous similar grant. *Railroad Company* v. *Smith*, 9 Wall. 95; *Schulenberg* v. *Harriman*, 21 *id.* 60; 1 Lester, 513; 8 Opin. 257; 11 *id.* 47. They vest a present title in the State of Kansas, though a survey of the lands and a location of the road are necessary to give precision to it, and attach it to any particular tract. The grant *then* becomes certain, and by relation has the same effect upon the selected parcels *as if it had specifically described them.* In other words, the grant was a float *until* the line of the road should be definitely fixed."

In *French* v. *Fyan*, 93 U. S. 169, the Court said:

"This court has decided more than once that the swamp land act was a grant *in præsenti*, by which *the title* to those lands passed at once to the State in which they lay."

In *Van Wyck* v. *Knevals*, 106 U. S. 360, 365, with regard to a grant to a State in aid of a railroad, the Court said:

"The grant is one *in præsenti*, except as its operation is affected by that condition; that is, it imports the transfer, subject to the limitations mentioned, of a present interest in the lands designated. The difficulty in immediately giving full operation to it arises from the fact that the sections designated as granted are incapable of identification until the route of the road is 'definitely fixed.' When that route is thus established the grant takes effect upon the sections by relation as of the date of the act of Congress. In that sense we say that the grant is one *in præsenti*. It cuts off all claims, other than those mentioned, to any portion of the lands from the date of the act, *and passes the title as fully as though the sections had then been capable of identification.*"

2. The present nature of the grant is not affected by a direction for a patent.

The Act construed in *Van Wyck* v. *Knevals*, *supra*, provided that the lands granted "shall inure to the benefit of "said company as follows: When the Governor of the State "of Kansas shall certify that any section of ten consecutive "miles of said road is completed, . . . then the Secre- "tary of the Interior shall issue to the said company patents " . . .; *Provided further* that if said road is not com-

" pleted within ten years from the date of the acceptance of " the grant hereinbefore made, the lands remaining unpat- " ented shall revert to the United States." The Court said, after the language quoted under the last head:

" Nor is this operation of the grant affected by the fact that patents of the United States are subsequently, upon the certificate of the governor, to be issued by the Secretary of the Interior directly to the company and not to the State. This is only a mode of divesting the State of her trust character and of passing *the legal title held by her* to the party for whose benefit the grant was made. *The legal title under the grant goes to the State*, but the equitable right vests in the company."

This question was necessarily involved in *Railroad Company* v. *Smith, supra.* There the land had not been patented, or even listed. In fact, the Secretary had failed to act at all in the matter. The Court held that, as all the lands of the description named had, in fact, been granted, the fact that any particular land was of that description could, in the absence of action by the Secretary, be proved by parol, thus showing that the grant had attached to it. The Court said:

" By the second section of the act of 1850 it was made the duty of the Secretary of the Interior to ascertain this fact, and furnish the State with the evidence of it. Must the State lose the land, though clearly swamp land, because that officer has neglected to do this? The right of the State did not depend on his action, but on the act of Congress, and though the States might be embarrassed in the assertion of this right by the delay or failure of the Secretary *to ascertain and make out* LISTS *of these lands*, the right of the States to them could not be defeated by that delay."

That this question was in the mind of the Court in that case, is clearly shown by the dissenting opinion of Mr, Justice Clifford, who placed his dissent (p. 102) expressly on the ground that no title vested in the State prior to the issuance of the patent.

We may here remark that this question was fully discussed, and decided upon the authority of the cases we have cited, by the Circuit Court of Appeals for the Fifth Circuit, in *Wineman* v. *Gastrell*, 53 Fed. Rep. 697. There an Act of the legislature of Mississippi declared that 35,000 acres of the lands situated in a certain swamp, (which contained 35,723 acres,) "be and the same are hereby granted" to certain commissioners, who were given power to sell the lands for certain purposes, and to issue to each purchaser a certain certificate, and that, upon the presentation of such certificate, the Secretary of State should issue a patent to the purchaser. It was held that neither the fact that the grant was merely one of quantity to be taken within certain boundaries, nor the fact that patents were expressly provided for, made the grant any the less a present one, and that the title passed under the Act without any patent.

The whole subject of the construction and effect of the Act of 1850 was elaborately considered by this Court in *Wright* v. *Roseberry*, 121 U. S. 488; and we take the liberty of here quoting all that part of the opinion which relates to that Act, though thus in some degree anticipating the points to be later discussed. The Court there said:

"It does not distinctly appear what caused the District Court to change its first decision with respect to those lands, which it had originally held to be swamp and overflowed; but, as it admitted in evidence the patents of the United States, and held that they passed the title to the defendants, it probably had reached the conclusion which the Supreme Court subsequently announced, that the plaintiff could not maintain an action upon the title to swamp and overflowed lands until they had been certified as such to the State, pursuant to the fourth section of the act of Congress of July 23, 1866, 'to quiet land titles in California.' For want of such certificate, the court decided that the title to the demanded premises never vested in the State, and that she could not convey a title to the plaintiff upon

which he could maintain an action of ejectment against persons in possession under patents of the United States. This ruling constitutes the alleged error for which a reversal is sought. To determine its correctness, it will be necessary to consider the nature of the grant to the state of the swamp and overflowed lands, the proceedings taken under the laws of the state and of the United States to ascertain and define their boundaries, and the effect of the act of July 23, 1866, and of § 2488 of the Revised Statutes as confirmatory of previous segregations by the state. The following is the swamp land act of September 28, 1850: [Here follows a copy of the Act.]

"Soon after the passage of this act, the question arose as to the time the grant took effect; whether at the date of the act, or on the issue of the patent to the state upon the request of the governor, after the list and plats of the lands were made out by the Secretary of the Interior and transmitted to him. The question was one of great importance to all the states in which there were swamp and overflowed lands. These lands amounted to many millions of acres, In California alone there were, according to the reports of the Land Department, nearly two millions of acres.

"The object of the grant, as stated in the act, was to enable the several states to which it was made, to construct the necessary levees and drains to reclaim the lands; and the act required the proceeds from them, whether from their sale or other disposition, to be used, so far as necessary, exclusively for that purpose. The early reclamation of the lands was of great importance to the states, not only on account of their extraordinary fertility when once reclaimed, but for the reason that until then they were the cause of malarial fevers and diseases in the neighborhood.

"The language of the first section of the act indicates a grant *in præsenti* to each state of lands within its limits of the character described. Its words 'shall be and are hereby granted' import an immediate transfer of interest, not a promise of a transfer in the future. It was only when the other sections of the act were read that a doubt was raised as to the immediate operation of the act. On the one hand, it was contended that these sections postponed the vesting of title in the state until the lands granted were identified, and a patent of the United States for them was issued. On the other hand, it was insisted that effect must be given to the clear words of the granting clause of the first section, which, *ex vi termini*, import the passing of a present interest, and that, in consistency with them, the other provisions of the act should be regard-

ed as simply providing *the mode of identifying the lands, and furnishing documentary evidence of their identification*, and not as a limitation upon vesting the right to them in the state, *as this would make the investiture dependent upon the request of the governor, and not upon the act of Congress.* It was also urged that identification of the lands could be made in a majority of instances from simple examination of them, and that no policy of the government could be advanced by postponing the passing of the title until the identification by the Secretary of the Interior; and that the clause providing, that upon the issue of the patent the fee should pass, *was merely declaratory of the nature of the title, the patent operating merely by way of further assurance.*

"The question thus brought to the attention of the Department, under whose supervision the act was to be carried into effect, was one upon which men might very well differ, *but after its solution had been reached, and the conclusion was acted upon, necessarily affecting titles to immense tracts of land, there should be the clearest evidence of error, as well as the strongest reasons of policy and justice controlling, before a departure from it should be sanctioned.*

"There are numerous cases in the history of the country where Congress, after confirming to parties title to lands, has directed that patents of the United States should be issued to them; *yet, it has been held that the patent in such cases operated merely as record evidence of the title, and added nothing to the title itself.* An illustration of this is presented in the case of claims confirmed to lands in the Northwest Territory which originated previously to its cession to the United States. By the act of Congress of March 26, 1804, 2 Stat. 277, c. 35, every person claiming lands within certain designated limits of that territory by virtue of a legal grant made by the French government prior to the Treaty of Paris of the 10th of February, 1763; or by the British government subsequent to that period, and prior to the treaty of peace between the United States and Great Britain on the 3rd of September, 1783; or by virtue of any resolution or act of Congress subsequent to that treaty, was required to deliver, on or before the first of January, 1805, to the register of the land office of the district in which the land was situated, a notice stating the nature and extent of his claim, together with a plat of the tract or tracts claimed. The register of the land office and the receiver of public moneys were constituted commissioners within their respective districts for the purpose of examining the claims. It was made their duty to hear in a summary manner all

matters respecting them, to examine witnesses, and to take any testimony that might be adduced before them and decide thereon according to justice and equity, and to transmit a transcript of their decisions in favor of claimants to the Secretary of the Treasury, who was required to lay it before Congress at the ensuing session.

"Among the claims presented under this act was one by the heirs of Jean Baptiste Tongas for lands in the neighborhood of Vincennes, the claim being founded upon an ancient grant to their ancestor. The commissioners decided in favor of the heirs and confirmed their claim, and transmitted a transcript of their decision to the Secretary of the Treasury, who laid the same before Congress. By the act of March 3, 1807, 2 Stat. 446, c. 47, this and other decisions in favor of persons claiming lands in the same district of Vincennes, transmitted to the Secretary of the Treasury, were confirmed. The act declared that every person, or his legal representative, whose claim was confirmed, and who had not previously obtained a patent therefor from the governor of the territory northwest of Ohio, or of Indiana Territory, should, whenever his claim was located and surveyed, have a right to receive from the register of the land office at Vincennes a certificate, *which should entitle him to a patent for his land, to be issued to him in like manner as is provided by law 'for the other lands of the United States.'* A survey of the tract thus confirmed was made in 1820, but no patent was issued until 1872, when one was issued, reciting the confirmation, by the act of 1807, of the decision of the Commissioners under the act of 1804. The patent purported to 'give and grant' to the heirs of Tongas the tract in question in fee. A party claiming under the heirs brought ejectment for the premises. The defendant claimed as tenant under one who had been in actual possession under claim and color of title for thirty years. The question for decision was, when did the title to the land vest in the heirs of Tongas. The court below held that it vested by the act of confirmation of 1807, when the land was located and surveyed in 1820, and that the patent was not itself the grant of the land by the United States, but merely evidence that a grant had been made to the heirs of Tongas. The defendant, therefore, had judgment. The case being brought to this court, the judgment was affirmed. *Langdeau* v. *Hanes*, 21 Wall. 521. In deciding the case, the court said :

"'In the legislation of Congress a patent has a double operation. It is a conveyance by the government when the government has any interest to convey, but where it is issued upon the confirmation of a

claim of a previously existing title, it is documentary evidence, having the dignity of a record, of the existence of that title or of such equities respecting the claim as justify its recognition and confirmation. The instrument is not the less efficacious as evidence of previously existing rights because it also embodies words of release or transfer from the government. In the present case the patent would have been of great value to the claimants, as record evidence of the ancient possession and title of their ancestor, and of the recognition and confirmation by the United States, and would have obviated, in any controversies at law respecting the land, the necessity of other proof, and would thus have been to them an instrument of quiet and security. *But it would have added nothing to the force of the confirmation.* The survey required for the patent was only to secure certainty of description in the instrument, and to inform the government of the quantity reserved to private parties from the domain ceded by Virginia.'

"The grants by the United States of land to aid in the construction of railroads, in relation to which we have had many cases before us, are in many particulars analogous to the grant by the swamp land act. They are usually of a specified number of sections of land on each side of the proposed route of the road, with a reservation of certain sales or of other disposition made before such road becomes definitely fixed. The usual words of grant in such cases are similar to those in the swamp land act—'there is hereby granted.' Though it is impossible to locate the land granted until the route is fixed, yet when that is fixed the grant takes effect as of the date of the act. This would be equally the case were the mode prescribed to fix the boundaries more complicated and difficult. Thus, in the case of *Leavenworth, Lawrence and Galveston Railroad Company* v. *United States*, 92 U. S. 733, the language was, 'There be and is hereby granted to the state of Kansas,' and in reference to it the court said: 'It creates an immediate interest and does not indicate a purpose to give in future. "There be and is hereby granted" are words of absolute donation and import a grant *in præsenti*. This court has held that they can have no other meaning, and the Land Department, on this interpretation of them, has uniformly administered every previous similar grant. . . . They vest a present title in the State of Kansas, though a survey of the lands and a location of the road are necessary to give precision to it, and attach it to any particular tract. The grant then becomes certain, and by relation has the same effect upon the selected parcels as if it had

specifically described them.' See, also, *Railroad Company* v. *Baldwin*, 103 U. S. 426; *Missouri, Kansas and Texas Railway Company* v. *Kansas Pacific Railway Company*, 97 U. S. 491; *Schulenberg* v. *Harriman*, 21 Wall. 44, 60; *Rutherford* v. *Greene's Heirs*, 2 Wheat. 196.

"It is plain that the difficulty of identifying the swamp and overflowed lands could not defeat or impair the effect of the granting clause, by whomsoever such identification was required to be made. *When identified, the title would become perfect as of the date of the act.* The patent would be *evidence* of such identification and declaratory of the title conveyed. It would establish definitely the extent and boundaries of the swamp and overflowed lands in any township, and thus render it unnecessary to resort to oral evidence on that subject. It would settle what otherwise might always be a mooted point, whether the greater part of any legal subdivision was so wet and unfit for cultivation as to carry the whole subdivision into the list. The determination of the Secretary upon these matters, as shown by the patent, would be conclusive as against any collateral attacks, he being the officer to whose supervision and control the matter is especially confided. The patent would thus be an invaluable muniment of title and a source of quiet and peace to its possessor. *But the right of the state under the first section would not be enlarged by the action of the Secretary, except as to land, not swamp or overflowed, contained in a legal subdivision,* as mentioned in the fourth section; nor could it be defeated, in regard to the swamp and overflowed lands, by his refusal to have the required list made out, *or* the patent issued, notwithstanding the delays and embarrassments which might ensue.

"The conclusion which the Land Department reached upon its examination of the character of the grant soon after the passage of the act, was that the title passed to the state at the date of the act. In a communication to the Commissioner of the General Land Office, under date of December 23, 1851, Mr. Stuart, then Secretary of the Interior, referring to the act of 1850 and the act of 1849 to aid Louisiana to drain her swamp lands, and stating that the first question involved was as to the period when the grants took effect—whether at the date of the law, or at the date of the approval of the selections by the Secretary—said: 'In each case, the granting clause is in the first section, and the words employed, viz., "are hereby granted," seem to me to import a grant *in præsenti*. They confer the right to the land, though other proceedings are necessary

to perfect the title. *When the selections are made and approved, or* the patent issued, *the title therefore becomes perfect*, and has relation back to the date of the grant.' And, further, 'As the grants are regarded as taking effect from the date of the laws making them respectively, and as vesting the inchoate title in the states, it follows that any subsequent sale or location of swamp or overflowed lands must be held to be illegal and the purchase money refunded, or a change of location ordered.' Lester's Land Laws, 549, No. 578.

"This construction of the grant has been followed by the Secretary's successors to this day. In a communication to the Commissioner of the General Land Office, April 19, 1877, Secretary Schurz said: 'The legal character of this grant (of 1850) has often been passed upon by the courts, and it has been uniformly held that the act was a present grant, vesting in the state, *proprio vigore* from the day of its date, title to all the land of the particular description therein designated, *wanting nothing but the definition of the boundaries to make it perfect.*' And, therefore, he held that swamp lands were not, in March, 1853, when the pre-emption laws were extended to California, public lands, and for that reason could not be entered and sold under those laws. 'The act of September 28, 1850,' he added, 'was notice to the world that all of the swampy lands in California were thereby granted *in præsenti* to the state, and were not subject to pre-emption, entry or sale thereafter; and the person who files a declaratory statement on lands actually swampy, does so with full notice that they are not public lands and that he cannot obtain any right thereby.' Copp's Public Land Laws, vol. 2, p. 1048.

"In a communication to the Commissioner of February 25, 1886, Secretary Lamar said: 'The principle has been formerly established by the decisions of the courts and of this Department that the grant of swamp lands made to the several states was a grant *in præsenti*, and conferred a present vested right to such lands as of the date of the grant, and that the field notes of survey may be taken as a basis in determining the character of the land if the state so elects.' Decisions of Dept. Interior, vol. 4, 415.

"A similar construction of the grant was given by Attorney General Black in an official communication to the Secretary of the Interior, under date of November 10, 1858. In February, 1853, Congress had made a grant of land to the states of Arkansas and Missouri to aid in the construction of a railroad, and under this grant a part of the lands previously granted to the state of Arkan-

sas by the act of September 28, 1850, under the designation of swamp lands, was included; and the question asked of the Attorney General was, which of the two acts gave the better title. In reply, he said: 'Where there is a conflict between two titles derived from the same source, either of which would be good if the other were out of the way, the elder one must always prevail; *prior in tempore potior est jure*. This difficulty, therefore, is solved if the mere grant [of 1850], as you call it, gave the State a right to the land from the day of its date. That it did so, there can be no doubt. In an opinion which I sent you on the 7th of June, 1857, concerning one of the same laws now under consideration, I said that a grant by Congress does of itself, *proprio vigore*, pass to the grantee all the estate which the United States had in the subject matter of the grant, except what is expressly excepted. I refer you to that opinion for the reasons and authorities upon which the principle is grounded. *It is not necessary that the patent should issue before the title vests in the State under the act of* 1850. The act of Congress was itself a present grant, wanting nothing but a *definition of boundaries* to make it perfect, and to attain that object the Secretary of the Interior was directed to make out an accurate list and plat of the lands and cause a patent to be issued therefor. *But when a party is authorized to demand a patent for land his title is vested as much as if he had the patent itself, which is but evidence of his title.*' 9 Opinions Attorneys General, 254.

"The same view of the act as a present grant, vesting in the State from its date the title to all the land within its limits of the particular description designated, wanting only a definition of boundaries to render the title perfect, was taken at an early period by the highest courts of several states within which swamp and overflowed lands existed. It was so held by the Supreme Court of Arkansas in 1859, in *Fletcher* v. *Pool*, 20 Ark. 100; in 1866, in *Branch* v. *Mitchell*, 24 Ark. 431, 444; and in 1874 in *Ringo's Executor* v. *Rotan's Heirs*, 29 Ark. 56.

"In *Fletcher* v. *Pool*, the court said: 'That the act was a present grant vesting in the state, *proprio vigore*, from the day of its date, title to all the land of the particular description therein designated, wanting nothing but the definition of boundaries to make it perfect, no doubts can be entertained. *The object of the second section was not to postpone the vesture of title in the State until a patent should issue, but was to provide for the ascertainment of boundaries* and to prevent a premature interference with the lands by the state

legislature before they were *so designated as to avoid mistake and confusion.*'

"In *Branch* v. *Mitchell*, the court said: 'We continue satisfied with the decisions heretofore made; and again hold that all the lands in the state, which were really and in fact swamp and overflowed, and thereby unfit for cultivation, passed to and vested in the State, on the 28th of September, 1850. The case is the same as if the grant had been of all the prairie land, or all the woodland, or all the alluvial land, in the state; the difficulty of ascertainment of its character not affecting the question. The words of grant, the operative words, are direct and positive: "Shall be and the same are hereby granted to the State;" and the provision of the second section, that the Secretary of the Interior should make out and transmit to the governor a list and plats of the land described, and at the request of the governor cause a patent to issue to the State; and that "on that patent the fee simple to said lands shall vest in the said State," can no more be held to limit the effect of the present grant in the first section, *than if, in a deed, after immediate and express conveyance of lands by some general description, it should be provided that, when the numbers should be ascertained, another deed should be made, "on which the fee simple should vest."* This would make the title of the State to any of the land depend on the request of the governor for a patent. The words of the second section must be held to be simply a definition of the *nature* of the title which the State took under the grant, *and not a postponement of the period at which the title should vest.*' 24 Ark. 444, 445.

"And in *Ringo's Executor* v. *Rotan's Heirs*, the court held that the title of the State to the swamp and overflowed lands granted to her by the act of September 28, 1850, accrued from the date of the act, and that a title derived from the State took precedence over a grant by the United States subsequent to that time.

"The same view was held by the Supreme Court of California in 1858, in *Owens* v. *Jackson*, 9 Cal. 322; and in *Summers* v. *Dickinson*, 9 Cal. 554; and in 1864 in *Kernan* v. *Griffith*, 27 Cal. 87; and in 1882 was assumed to be the correct view in *Sacramento Valley Reclamation Co.* v. *Cook*, 61 Cal. 341. In the first of these cases, which was an action for the possession of swamp and overflowed lands held under a patent of the State, the defendant demurred to the complaint, on the ground that it did not show that the land had been surveyed and patented to the State. The demurrer was sustained in the Court below, but the Supreme Court reversed the

decision, holding that the State had the right to dispose of lands of that character granted to her by the act of 1850, prior to the patent of the United States. 'The act of congress,' said the court, 'describes the land, not by specific boundaries, but by its quality, and is a legislative grant of all the public lands within the state of the quality mentioned. The patent is matter of evidence and description by metes and bounds. The office of the patent is to make the description of the lands definite and conclusive as between the United States and the State.' The same conclusion was reached in 1861 by the Supreme Court of Iowa, in *Allison* v. *Halfacre*, 11 Iowa, 450, which was subsequently followed in all its decisions on the subject.

"At a later day, the Supreme Courts of Missouri and Oregon held the same doctrine. *Clarkson* v. *Buchanan*, 53 Missouri, 563; *Campbell* v. *Wortman*, 58 Missouri, 258; *Gaston* v. *Stott*, 5 Oregon, 48. The Supreme Court of Illinois in 1863, expressed the same view in *Supervisors* v. *State's Attorney*, 31 Ill. 68; then receded from it in *Grantham* v. *Atkins*, 63 Ill. 359; and, in 1873, in *Thompson* v. *Prince*, 67 Ill. 281; but returned to its first conclusion, in 1875, in *Keller* v. *Brickey*, 78 Ill. 133.

"The question came before this Court at the December term, 1869, in *Railroad Company* v. *Smith*, 9 Wall. 95, and the same doctrine as to the character of the grant was affirmed. On the 10th of June, 1852, Congress had made to the State of Missouri a grant of land to aid in the construction of certain railroads, and the legislature of the state had conveyed the land to the Hannibal and St. Joseph Railroad Company. One Smith held certain swamp and overflowed lands, which he had obtained from the State, and the question presented was whether the grant to the State in aid of the railroads covered the swamp and overflowed lands granted to her by the act of September 28, 1850, the latter not having been certified to the State by the Secretary of the Interior, nor patented to her. After referring to the first section the Court said: [Here follows the language previously quoted in this brief] . . .

"The Court added, that, as the Secretary of the Interior had no satisfactory evidence under his control to enable him to make out these lists, he must, if he attempted it, rely on witnesses whose personal knowledge would enable them to report as to the character of the tracts claimed to be swamp and overflowed; 'that the matter to be shown was one of observation and examination, and, whether arising before the Secretary, whose duty it was primarily to decide

it, or before the court, whose duty it became because the Secretary had failed to do it, this was clearly the best evidence to be had, and was sufficient for the purpose.' And it was held that the grant in aid of the railroads did not include the swamp and overflowed lands.

"In *French* v. *Fyan*, 93 U. S. 169, 170, which was before this court at October term, 1876, the same view was taken of the grant, and the effect to be given to a patent of the United States for swamp lands was stated. That was an action of ejectment for such lands for which a patent had been issued to the State of Missouri under the act of 1850. The lands had been conveyed to the Missouri Pacific Railroad Company by the State as part of the land granted to aid in the construction of its road by the act of June 10, 1862, and the plaintiff had by purchase become vested with the title of the company. To overcome the *prima facie* case made by him, the defendant gave in evidence the patent of the State under the swamp land act of 1850, from which he traced title by regular conveyances. The plaintiff then offered to prove by witnesses who had known the character of the land from 1849 down to the time of the trial, that the land was not swamp and overflowed, and made unfit thereby for cultivation, and that, since 1849, the greater part was not, and never had been, in that condition. The court below held that the question was concluded by the patent of the United States to the State for the land as swamp land under the act of September 28, 1850, and rejected the testimony. The admissibility of the testimony was thus presented for determination. In giving our decision we said: 'This court has decided more than once that the swamp land act was a grant *in præsenti*, by which the title to those lands passed at once to the State in which they lay, except as to the States admitted into the Union after its passage. The patent, therefore, which is the *evidence* that the lands contained in it had been identified as swamp lands under that act, relates back and gives certainty to the title of the date of the grant. As that act was passed two years prior to the act granting lands to the State of Missouri for the benefit of the railroad, the defendant had the better title on the face of the papers, notwithstanding the certificate to the railroad company for the same land was issued three years before the patent to the State under the act of 1850. For, while the title under the swamp land act, being a present grant, takes effect as of the date of that act, or of the admission of the State into the Union when this occurred afterwards, there can be no claim

of an earlier date than that of the act of 1852, two years later, for the inception of the title of the railroad company.' And upon the admissibility of parol testimony to show that the land in the patent was not swamp land, the court said that by the second section of the act the power and duty were conferred upon the Secretary of the Interior, as the head of the department which administered the affairs of the public lands, of determining what lands were of the description granted, and made his office the tribunal whose decision on that subject was to be controlling. The parol evidence, therefore, was held to be inadmissible. 93 U. S. 172.

"In commenting upon the case of *Railroad* v. *Smith*, upon which reliance was placed for the admission of the parol testimony, the court said: 'The admission was placed expressly on the ground that the Secretary of the Interior had neglected or refused to do his duty; that he had made no selections or lists whatever, and would issue no patents, although many years had elapsed since the passage of the act.' . . . 'There was no means,' it added, 'as this court has decided, to compel him to act; and if the party claiming under the State in that case could not be permitted to prove that the land which the State had conveyed to him as swamp land was in fact such, a total failure of justice would occur, and the entire grant of the State might be defeated by this neglect or refusal of the Secretary to do his duty.'

"This view of the character of the grant was recognized in *Rice* v. *Sioux City and St. Paul Railroad Company*, decided at the October term, 1883, 110 U. S. 695, 697, 698. The question there was, whether the swamp land act extended to territories upon their subsequent admission as states into the Union. It was held that it did not. Said the court, speaking by the Chief Justice: 'That the swamp land act of 1850, operated as a grant *in præsenti* to the States then in existence of all the swamp lands in their respective jurisdictions, is well settled,' citing the cases of *Railroad Company* v. *Smith*, 9 Wall. 95; *French* v. *Fyan*, 93 U. S. 169, and *Martin* v. *Marks*, 97 U. S. 345. And again: 'The grant under the act of 1850 was to Arkansas and the other states of the Union. Arkansas was an existing state, and the grant was to all the states *in præsenti*. It was to operate upon existing things, and with reference to an existing state of facts.'—'It was to take effect at once between an existing grantor and several separate existing grantees.'

"The result of these decisions is, that the grant of 1850 is one *in præsenti*, passing the title to the lands as of its date, but requiring *identification* of the lands to render the title perfect; that the action of the Secretary in *identifying* them is conclusive against collateral attack, as the judgment of a special tribunal to which the determination of the matter is intrusted; but, when that officer has neglected or failed to make the identification, it is competent for the grantees of the State, to prevent their rights from being defeated, to identify the lands in any other appropriate mode which will effect that object. A resort to such mode of identification would also seem to be permissible, where the Secretary declares his inability to certify the lands to the State for any cause other than a consideration of their character."

The rules laid down in that case were followed in *Irwin* v. *S. F. Savings Union*, 136 U. S. 578. In the opinion of Mr. Justice Field at Circuit, which is published in the report in this Court, that learned jurist said :

"The Act is a grant *in præsenti* to each State then in the Union of lands situate within its limits of the quality described. Its language is that they 'shall be and the same are hereby granted to said State,' words which import an immediate transfer of interest, and not one in the future. The provisions of the second section making it the duty of the Secretary of the Interior, as soon as practicable after the passage of the Act, to make out an accurate list and plat of the lands described, to transmit the same to the governor of the State, and on his request to cause a patent to be issued to the State; and declaring that 'on that patent the fee simple to the said lands shall vest in the State,' subject to the disposal of the legislature thereof,—*did not prevent the immediate passing of the title.* The patent, with the definite description by metes and bounds of the land which it would furnish, would serve a useful purpose. It would render it unnecessary for the State, or grantees from the State, to make any further proof of the character of the land should any controversies arise respecting it. In many ways, doubts might be created on the subject; the evidence might be conflicting as to whether the greater part of a legal subdivision fell within the description required as being 'wet and unfit for cultivation.' In all such cases the patent would solve the doubt, for the determination in that respect of the Secretary of the Interior would be controlling.

The ascertainment and designation of the lands as those described would be conclusive as against collateral attack. But the title of the State to the lands, they being swamp and overflowed, cannot be defeated, nor in any way impaired, by the delay or refusal of the Secretary of the Interior to have the required list made and patent issued. *The State and her grantees might be embarrassed in the assertion of their rights, but no other consequences would follow.*"

The same doctrines were repeated in *Tubbs* v. *Wilhoit*, 138 U. S. 134.

The same proposition has been repeatedly decided by this Court as to the grants in aid of the Pacific Railroads, *in which patents were expressly provided for.* We will refer to a few of them.

In *Wisconsin Central R. Co.* v. *Price County*, 133 U. S. 496, the Court said:

"So far as the eleven parcels of forty acres each are concerned, the right of the plaintiff to them and to a patent for them had as early as 1877 become complete under the terms of the Granting Act. The line of the railroad had been definitely fixed on the 7th of October, 1869; and the three twenty-mile sections, numbers five, six and seven, were all completed in June, 1877, and supplied with the buildings and appurtenances specified in the Act to entitle the Company to a patent for them from the United States. The title conferred by the grant was necessarily an imperfect one, because, until the lands were *identified* by the definite location of the road, it could not be known what specific lands were embraced in the sections named. The grant was therefore, until such location, a float. But when the route of the road was definitely fixed, the sections granted became susceptible of identification, and the title attached to them and took effect as of the date of the grant, so as to cut off all intervening claims. *Schulenberg* v. *Harriman*, 88 U. S. 21 Wall. 44, 60; *Leavenworth, Lawrence & Galveston R. Co.* v. *United States*, 92 U. S. 733, 741; *Missouri, Kansas & Texas R. Co.* v. *Kansas Pacific R. Co.*, 97 U. S. 491, 496; *St. Joseph & Denver City R. Co.* v. *Baldwin*, 103 U. S. 426, 429. The road having been built as early as June, 1877, and supplied, as required, with the appurtenances specified, the Company was entitled to have the restrictions upon the use of the land released. It had then, to the eleven

forty-acre parcels which were capable of identification, *an indefeasible right or title;* it matters not which term be used. *The subsequent issue of the patents by the United States was not essential to the right of the Company to those parcels,* although in many respects they would have been of great service to it. They would have served to identify the lands as co-terminous with the road completed; they would have been evidence that the grantee had complied with the conditions of the grant, and to that extent that the grant was relieved of possibility of forfeiture for breach of them; they would have obviated the necessity of any other evidence of the grantee's right to the lands; and they would have been evidence that the lands were subject to the disposal of the Railroad Company with the consent of the government. They would have been in these respects deeds of further assurance of the patentee's title, and therefore a source of quiet and peace to it in its possessions.

"There are many instances in the Reports where such effect as is here stated has been given to patents authorized or directed to be issued to parties, notwithstanding they had previously received a legislative grant of the premises, or their title had been already confirmed. [Quoting from *Langdeau* v. *Hanes, supra.*] We are of opinion, therefore, that these eleven forty-acre parcels were in 1883 subject to taxation by the State of Wisconsin. The lands had become the *property* of the Railroad Company, and there was nothing to hinder their use and enjoyment. For that purpose it is immaterial whether it be held that the Company then had a legal and indefeasible title to the lands, or merely an equitable title to them to be subsequently perfected by patents from the government."

In *Deseret Salt Co.* v. *Tarpey*, 142 U. S. 241, the Court said:

"In a great number of cases grants containing similar terms have been before this court for consideration. They have always received the same construction, that unless the terms are restricted by other clauses they import a grant *in præsenti*, carrying at once the interest of the grantor in the lands described. *Schulenberg* v. *Harriman*, 88 U. S. 21 Wall. 44; *Leavenworth L. & G. R. Co.* v. *United States*, 92 U. S. 733. . . .

"As the sections granted were to be within a certain distance on each side of the line of the contemplated railroad, they could not be located until the line of the road was fixed. The grant was, there-

fore, in the nature of a 'float;' but, *when* the route of the road was definitely fixed, the sections granted became susceptible of identification, and the title *then* attached as of the date of the grant, except as to such parcels as had been in the meantime under its provisions appropriated to other purposes.

"That doctrine is very clearly stated in the Leavenworth case cited above, where the language of the grant was identical with that of the one under consideration, and the court said: [Quoting the language heretofore quoted in this brief.]

"The terms used in the granting clause of the Act of Congress, and the interpretation thus given to them, exclude the idea that they are to be treated as words of contract or promise rather than, as they naturally import, as words indicating an immediate transfer of interest. *The title transferred is a legal title, as distinguished from an equitable or inchoate interest.*

"The case of *Rutherford* v. *Greene*, 15 U. S. 2 Wheat. 196, well illustrates the nature of the title. In 1782 the State of North Carolina passed an Act providing 'that twenty-five thousand acres of land shall be allotted for and given to Major-General Nathaniel Greene,' within the bounds of a tract reserved for the use of the army, to be laid off by commissioners designated in the Act, as a mark of the high sense the State entertained of the extraordinary services of that brave and gallant officer. The commissioners allotted the twenty-five thousand acres, and in 1783 caused a survey of them to be made, and returned to the proper office. One Rutherford claimed under a subsequent entry five thousand acres of the tract, and instituted a suit to establish his claim. The case turned upon the validity of Greene's title, and the date at which it commenced. It was contended by Rutherford's counsel that the words of the Act gave nothing; that they were in the future and not in the present tense; and indicated an intention to give in future, but created no present obligation on the State, nor present interest in General Greene. But the court, speaking by *Chief Justice* Marshall, answered that it thought differently; that the words were words of absolute donation, not indeed of any specific land, but of twenty-five thousand acres in the territory reserved for the officers and soldiers; that as an act of setting apart that quantity to General Greene was to be performed in the future, the words directing it were necessarily in the future tense, but that nothing could be more apparent than the intention of the Legislature *to order the commissioners to make the allotment, and to give the land when allotted to General Greene.* And the court held

that the general gift of twenty-five thousand acres, lying in the reserved territory, became *by the survey* a particular gift of that quantity contained in the survey; and concluded an elaborate examination of the title by stating that it was clearly and unanimously of the opinion that the Act of 1782 vested a title in General Greene to twenty-five thousand acres of land, to be laid off within the bounds allotted to the officers and soldiers, *and that the survey made and returned in pursuance of that Act gave precision to that title and attached it to the land surveyed.* . . .

"But it is contended that the natural import of the granting terms of the Act is qualified and restricted by its fourth section, which, as amended by the Act of 1864, provides that, upon the completion of not less than twenty consecutive miles of the road and telegraph line in the manner required, and their acceptance by the President upon the report of commissioners appointed to examine the work, *patents shall issue* to the company *conveying the right and title* to lands on each side of the road as far as the same is completed.

"The question naturally arises as to the necessity for patents, if the title passed by the Act itself upon the definite location of the road, when the alternate sections granted had become identified. We answer that objection by saying that there are many reasons why the issue of patents would be of great service to the patentees, and by repeating substantially what we said on that subject in *Wisconsin Cent. R. Co.* v. *Price Co.* 133 U. S. 406, 510. *While not essential to transfer the legal right*, the patents would be evidence that the grantee had complied with the conditions of the grant, and to that extent that the grant was relieved from the possibility of forfeiture for breach of its conditions. They would serve to identify the lands as coterminous with the road completed; they would obviate the necessity of any other evidence of the grantee's right to the lands, and they would be evidence that the lands were subject to the disposal of the railroad company with the consent of the government. They would thus be in the grantee's hands deeds of further assurance of his title, and, therefore, a source of quiet and peace to him in its possession."

And the Court adds:

"*A legal title to the sections designated, as distinguished from a merely equitable or inchoate interest, passed to the railroad company by the Act of Congress, upon the definite line of the road being established.*"

And, in *Curtner* v. *U. S.*, 149 U. S. 662, 675, the Court said:

"The grant was *in præsenti*, and attached upon the filing of the map of definite location. When the identification of a granted section became so far complete as to authorize the grantee to take possession, the *legal title* of the granted land passed, and an action for possession could be maintained by the company or its grantees *before the issue of a patent*. The patent would have been evidence that the land named was granted, that the grantee had complied with the conditions of the grant, and that the grant was to that extent relieved from the possibility of forfeiture for breach of its conditions, *but was not essential to transfer the legal right*."

We submit, then, that it is established, if any proposition can be established by judicial decisions, that the requirement of this Act concerning the issuance of patents does not affect or modify the clear words of present grant, and that, as soon as the Secretary has, by the listing, identified the land, the title passes.

3. The effect of identification by the Secretary.

We have shown, by the decisions referred to, that the Act amounted to a present grant, needing nothing but a definition of boundaries to make it perfect, and that the duty of defining those boundaries, or in other words, of identifying the lands granted, was imposed, at least primarily, upon the Secretary of the Interior. It would seem to follow, as a necessary conclusion, that, when the Secretary has, by making and transmitting the "list," so identified the lands, the grant *has* become perfect, and that the *title* has passed, *in the same manner as if they had been specifically identified by the Act*. Such is the purport of the decisions we have cited, and on no other ground could they have been decided as they were decided. They are thus summarized in *Tubbs* v. *Wilhoit*, *supra*:

"It was held that the words 'are hereby granted,' in the Act, imported a present grant, and not a promise of one in the future; and that the title to the lands therefore passed to the State at once, their identification to be made by the action of the Secretary of the Interior, *but when identified* the title to relate back to the date of the Act. . . . The construction thus given to the Act is now the accepted law of the country."

4. The certification by the Secretary gives a vested right to a patent, equivalent to a patent issued.

It follows from what has been said that the only purpose of the machinery provided by the Act was the identification of the granted lands. This identification was to be effected by the Secretary, and he was required to furnish to the State "an accurate list and plats of the lands," and to "cause a patent to be issued to the State therefor." This patent was certainly intended to be issued for the lands described in the list; and therefore the right to have the patent issued accrued immediately upon the making and approval of the list. Such a right is, certainly in equity, equivalent to the patent itself.

In *Stark* v. *Starr*, 6 Wall. 402, 417, the Court said:

"Before the passage of this act the claim of the defendant, Stark, had been surveyed, and the required proof of his settlement and continued occupation and residence made, and such steps had been taken as to perfect his right to a patent. The lands embraced by his claim had then ceased to be the subject of purchase from the United States by any person, natural or artificial. *The right to a patent once vested is treated by the government, when dealing with the public lands, as equivalent to a patent issued.*"

In *Barney* v. *Dolph*, 97 U. S. 652, 656, the Court said:

"When the right to a patent once became vested in a settler under the law, it was equivalent, so far as the government was concerned, to a patent actually issued. . . . The execution and delivery of the patent after the right to it is complete are the mere *ministerial* acts of the officer charged with that duty."

The doctrine of these cases was expressly approved in *Simmons* v. *Wagner*, 101 U. S. 260, and applied, *at law*, to defeat a patent subsequently issued to another.

It is, however, wholly unnecessary for the purposes of this case to determine whether the "listing," under this Act, does or does not create a *legal* title. It is sufficient to say that, in this suit in equity, an equitable title is as good as a legal one. That at least an equitable title passed, is unquestionable; and, if anything was left in the United States, it was a dry legal title, which it was bound to convey to the State on request.

5. Upon the listing, the control of the Land Department ceased as to this land.

It is a principle so well settled that we need not refer to authorities to sustain it, that, whenever the title has passed from the United States, the *control* of the Land Department over the land ceases. From that moment, the duties of the officers of that department, if any remain in them, become merely ministerial. Nor does it matter, as a moment's reflection will show, whether the title which has thus passed is the legal title, or merely an equitable one. If the right of the grantee is such that it is the *duty* of the Government to convey to him the legal title, that duty cannot be defeated by the act of any officer of the Government. In equity, the grantee is the owner, and the Government is his trustee.

The case of *Noble* v. *Union River Logging R. Co.*, 147 U.S. 165, is precisely analogous to the case at bar. The only difference between the two cases is that, in the *Noble* case, the law made no provision for a patent. That distinction, we submit, we have shown to be unimportant. The principle, as established by the decisions we have cited, is that, when the steps required by law to identify the granted land have been

taken, the grant has attached to the land and become perfect, and that such is the case whether the granting Act does or does not provide for a patent. That being so, the *Noble* case is, in every material respect, the same as the present one. That case is too long for quotation here, and should be read as a whole. We will, however, in view of some suggestions made on the other side, which we will hereafter consider, here quote the concluding portion of that decision:

"With the title passes away all authority or control of the Executive Department over the land, and over the title which it has conveyed. . . . The functions of that department necessarily cease when the title has passed from the government.

"We think the case under consideration falls within this latter class. The lands over which the right of way was granted were public lands subject to the operation of the statute, and the question whether the plaintiff was entitled to the benefit of the grant was one which it was competent for the Secretary of the Interior to decide, and *when decided*, and his *approval* was noted upon the plats, the first section of the Act *vested* the right of way in the railroad company. The language of that section is 'that the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any state or territory,' etc. The uniform rule of this court has been that such an Act was a grant *in præsenti* of lands to be thereafter identified. *Denver & R. G. R. Co.* v. *Alling*, 99 U. S. 463. The railroad company became at once vested with a right of property in these lands, of which they can only be deprived by a proceeding taken directly for that purpose. If it were made to appear that the right of way had been obtained by fraud, a bill would doubtless lie by the United States for the cancelation and annulment of an approval thus obtained. *Moffatt* v. *United States*, 112 U. S. 24; *United States* v. *Minor*, 114 U. S. 233. *A revocation of the approval of the Secretary of the Interior, however, by his successor in office, was an attempt to deprive the plaintiff of its property without due process of law, and was, therefore, void.* As was said by *Mr. Justice* Grier, in *United States* v. *Stone*, 69 U. S. 2 Wall. 525, 535: 'One officer of the land office is not competent to cancel or annul the act of his predecessor. *That is a judicial act and requires the judgment of a court.*' *Moore* v. *Robbins*, 96 U. S. 530."

The question considered on principle.

One of the most familiar of the canons of construction of statutes is, that regard should be had to the purpose and object of the statute, especially where such purpose is therein expressly declared; and that any construction which tends to defeat that object should be avoided. In this case the Act explicitly sets out its purpose. The first section declares that the grant is made "to enable the State of Arkansas to con- "struct the necessary levees and drains to reclaim the swamp "and overflowed lands therein"; and the second section pro- vides that the proceeds of the granted lands "shall be "applied exclusively, as far as necessary, to the purpose of "reclaiming said lands by means of the levees and drains "aforesaid." It was, therefore, the intention and desire of Congress that the State should reclaim these lands, and, for that purpose, should sell them, if necessary, to obtain the requisite funds. The importance of this reclamation to the public welfare, which induced Congress to make so extensive a grant, supposes also a desire that it should not be impeded by unreasonable delays; and we must therefore presume that Congress intended a speedy adjustment of the grant, in order that its object might be effected. Clearly, if it had been possible to describe the lands specifically in the Act, Con- gress would have done so, and thus left nothing further to be done. This not being possible, the Secretary of the Interior was directed, "*as soon as may be practicable after the passage* "*of this Act,*" to make out and transmit to the State "an "accurate list and plats" of the lands granted. Now, what purpose could be subserved by this list, unless to enable the State to *know*, as soon as possible, the specific description of the granted lands, and, upon that knowledge, to proceed with

their sale for the purpose of reclamation? Since only a definition of boundaries was necessary to make the grant immediately available, the official definition provided for by the Act must have been intended to accomplish that object, and, when made, to perfect the grant. Certainly, it was not intended that everything should wait until patents should be issued; for the direction to make and transmit the list was peremptory and urgent, while patents were to be issued only on the request of the Governor. We think, therefore, that it is palpable that, *at least*, the Act must be construed as if it had said: "There is hereby granted to the State all the lands "which shall be described as swamp and overflowed upon a "list and plats to be made, as soon as practicable, by the "Secretary of the Interior, and by him transmitted to the "State." The Act, no doubt, means more than this; but we do not see how, on any just principle of construction, it could be held to mean less.

Now, on the construction contended for by the Secretary in this case, this requirement of an official list of the lands was utterly nugatory. The Secretary was, it is true, directed to make and transmit such a list; but he contends that no useful purpose was to be subserved thereby. Notwithstanding its making and transmission, the whole matter, according to his theory, remained *in petto;* he might, at any time, reconsider his decision; even his remote successors in office might upset it; their decisions, in turn, might be overturned by their successors, and so *ad infinitum*. Thirty-eight years has elapsed since this grant was made to the State of Oregon; and yet, on his construction, the whole matter is now as open as ever it was; the State has no more means of knowing whether these lands were granted or not, than it had at the date of the Act; and it never can know until he, or some one

of his successors, shall please to issue a patent to the State or to some one adverse to it. Such a construction not only overthrows the constant practice, judicial and ministerial, of nearly fifty years, but it absolutely defeats the expressed object and purpose of the Act, and violates every principle by which the will of the legislature is to be ascertained.

It has been held from the first, as shown by the decisions cited, that the State had the right to dispose of these lands, without waiting for a patent; and that this follows from the declared object of the Act is, we think, evident. That such purchases would be made on the faith of the Secretary's "list", is certain; and the purchasers would have a clear right to so rely on it. (*U. S.* v. *California & Oregon Land Co.*, 148 U. S. 31, 43–45.) It must be, therefore, that Congress intended the decision of the Secretary, evidenced by his approval and transmission of the list, to be a *final decision* as to the character of the land, so far as the Land Department is concerned. If it were not so, it would be impossible for the State to dispose of the lands, and the expressed purpose of the grant would be, in great measure, defeated.

We therefore submit that, on principle as well as on authority, when the Secretary has once, by a "list" made in accordance with law, identified the granted land, the grant becomes at once perfect and indefeasible; and that any subsequent controversy concerning it presents a judicial question, to be decided by the courts and not by the Land Department.

Some suggestions of the defendant in reply to these positions we will examine after discussing the case of *Michigan Land & Lumber Co.*, v. *Rust.*

The case of Michigan Land & Lumber Co. v. Rust.

We have already said that the decision of the question here presented was not necessary for the determination of that case. A brief statement of the facts will make this clear, and will conduce to a better understanding of the opinion.

Certain of the public land surveys in the State of Michigan were erroneous, if not actually fraudulent. While proceedings were pending for resurveys, the Secretary, probably through inadvertence, made out and transmitted to the State a list of lands shown to be swamp by those erroneous surveys. That extensive frauds in the surveys in that State were known to its Legislature, was shown by a resolution which it passed, reciting that large districts of lands had been returned by the deputy U. S. surveyors as surveyed "where no surveys what-"ever had been made, or where the surveys have been so "imperfectly done as to be utterly valueless"; and requesting the President to cause resurveys to be made. Upon such resurveys, the lands in question were found not to be swamp lands; and thereupon new lists were made out accordingly and accepted by the State. The decision in the case was finally made to turn on two propositions: That the State had accepted the re-adjustment; and that, when the surveys, on which the former list depended, had been set aside, nothing was left to support it. That this last proposition, though not directly stated in the opinion, is implicitly contained in it, and was one of the foundations of the judgment, is shown by the discussion as to the confirmatory Act of 1857. (Pp. 599–604.)

Premising this, we here quote so much of that opinion as relates to the point now under discussion. The Court said:

"This case involves questions of the power of the Land Department over the matter of the identification of the particular lands passing under the swamp land act of 1850, of the finality of the action of the Secretary of the Interior in approving and certifying to the governor of the state a list of such lands, and of the effect of the confirmatory act of 1857. There is no testimony showing what was in fact the condition of the land, whether swamp or not, at the time of the passage of the act of 1850, and the case turns wholly upon the documentary evidence.

"The act of 1850 made a grant *in præsenti;* in other words, the title then passed to all lands which at that date were swamp lands, and the only matters thereafter to be considered were those of *identification. Hannibal & St. J. Railroad Co.* v. *Smith*, 76 U. S. 9 Wall. 95; *French* v. *Fyan*, 93 U. S. 169; *Martin* v. *Marks*, 97 U. S. 345; *Rice* v. *Sioux City & St P. Railroad Company*, 110 U. S. 695; *Wright* v. *Roseberry*, 121 U. S. 488; *Tubbs* v. *Wilhoit*, 138 U. S. 134. But while the act operated as a grant *in præsenti*, the determination of what lands were swamp lands was intrusted to the Secretary of the Interior. Section 2 contains this provision: [Quoting that section.]

"It may be remarked in passing that while the 1st and 2d sections refer specially to the state of Arkansas, § 4 of the act makes it applicable to all the states. It is true that in the 1st section Congress defines the lands granted as 'swamp and overflowed lands, made unfit thereby for cultivation;' and § 3, referring to the lists and plats ordered by § 2 to be made out by the Secretary of the Interior, contains this further specification as to the character of the lands granted:

"'That in making out the list and plats of the lands aforesaid, all legal subdivisions, the greater part of which is "wet and unfit for cultivation," shall be included in said lists and plats; but when a greater part of a subdivision is not of that character, the whole of it shall be excluded therefrom.'

"But while Congress thus defined what it intended to grant as swamp and overflowed lands, it intrusted, as appears from § 2, the identification of those lands to the Secretary of the Interior.

"It will be perceived that the act contemplated the issue of a patent as the means of transferring the legal title. In *Rogers Locomotive Mach. Works* v. *American Emigrant Company*, 164 U. S. 559, 574, it was said, speaking in reference to this matter, and after a full review of the previous authorities: 'When he [that is, the Secretary

of the Interior] made such identification, then, and not before, the state was entitled to a patent, and "on such patent" the fee-simple title vested in the state. The state's title was at the outset an inchoate one, and did not become perfect, as of the date of the act, until a patent was issued.'

"Generally speaking, while the legal title remains in the United States, the grant is in process of administration and the land is subject to the jurisdiction of the Land Department of the Government. It is true a patent is not always necessary for the transfer of the legal title. Sometimes an act of Congress will pass the fee. *Strother* v. *Lucas*, 37 U. S. 12 Pet. 410, 454; *Grignon's Lessee* v. *Astor*, 43 U. S. 2 How. 319; *Chouteau* v. *Eckhart*, 43 U. S. 2 How. 344-372; *Glasgow* v. *Hortiz*, 66 U. S. 1 Black, 595; *Langdeau* v. *Hanes*, 88 U. S. 21 Wall. 521; *Ryan* v. *Carter*, 93 U. S. 78. Sometimes a certification of a list of lands to the grantee is declared to be operative to transfer such title (Rev. Stat. § 2449; *Frasher* v. *O'Connor*, 115 U. S. 102), but wherever the granting act specifically provides for the issue of a patent, then the rule is that the legal title remains in the government until the issue of the patent (*Bagnell* v. *Broderick*, 38 U. S. 13 Pet. 426-450); and while so remaining, the grant is in process of administration, and the jurisdiction of the Land Department is not lost.

"It is, of course, not pretended that when an equitable title has passed the Land Department has power to arbitrarily destroy that equitable title. It has jurisdiction, however, after proper notice to the party claiming such equitable title, and upon a hearing to determine the question whether or not such title has passed. *Cornelius* v. *Kessel*, 128 U. S. 456; *Orchard* v. *Alexander*, 157 U. S. 372-383; *Parsons* v. *Venzke*, 164 U. S. 89. In other words, the power of the department to inquire into the extent and validity of the rights claimed against the government does not cease until the legal title has passed. 'A warrant and survey authorize the proprietor of them to demand the legal title, but do not, in themselves, constitute a legal title. Until the consummation of the title by a grant, the person who acquires an equity holds a right subject to examination.' *Miller* v. *Kerr*, 20 U. S. 7 Wheat. 1, 6. After the issue of the patent the matter becomes subject to inquiry only in the courts and by judicial proceedings. *Stone* v. *United States*, 69 U. S. 2 Wall. 525, 535; *Moore* v. *Robbins*, 96 U. S. 530; *United States* v. *Schurz*, 102 U. S. 378-396; *Bucknell* v. *Comstock*, 113 U. S. 149, 151; *Iron Silver Mining Co.* v. *Campbell*, 135 U. S. 286; *Williams* v. *United States*, 138

U. S. 514. This jurisdiction of the department has been maintained in cases of pre-emption where the entire purchase money has been paid and a receiver's final certificate issued. *Orchard* v. *Alexander*, 157 U. S. 372, and cases cited in the opinion; *Parsons* v. *Venzke*, 164 U. S. 89."

The Court then proceeds to quote from *Knight* v. *United Land Association*, and other similar cases, and concludes as follows:

"So, notwithstanding that a survey had been made and that such survey indicated that the land in controversy was swamp land, and therefore passing under the act of 1850 to the state of Michigan, it was within the power of the Land Department, at any time prior to the issue of a patent, of its own motion, *to order a resurvey*, and correct by that any mistakes in the prior survey."

It will be seen that, as we have said, the conclusion of the Court on this point is made to depend entirely upon the provision in the Act of 1850 providing for the issuance of patents. We have already shown that this view is opposed to the whole course of decision in this Court, and to the obvious meaning of the act. We shall proceed to show that the authorities cited by the Court in support of that view do not sustain it.

The cases cited directly to that point are two: *Locomotive Works* v. *Emigrant Co.*, 164 U. S. 559, and *Bagnell* v. *Broderick*, 13 Pet. 436. Neither of those cases is an authority on this point.

In the former case, which arose under the Swamp Land Act, the Secretary *had never listed* or otherwise identified the lands *as swamp*, but, on the contrary, had listed them under a railroad grant; and the only question was *whether the railroad list could be overcome by parol evidence that the lands were swamp.* The court held such evidence inadmissible, *on the ground that the listing was a conclusive*

determination that the lands were not swamp. It is evident, therefore, that the effect of the clause in the Act as to patents was not in question in that case, and could not have been decided. It is true that the Court said, *arguendo*, (p. 574,) "The state's title was at the outset an inchoate one, "and did not become perfect, as of the date of the act, until "a patent was issued." This language is, of course, mere *dictum;* but it is evident that the Court, in using it, had no such idea as is now contended for. In the sentence immediately preceding, the Court had said, "*When he had made* "*such identification*, then, and not before, *the state was entitled* "*to a patent.*" And (p. 570) it had also said, "While, there- "fore, as held in many cases, the act of 1850 was *in præsenti*, "and gave an inchoate title, the lands needed to be *identified*, "as lands that passed under the act; *which being done*, and "not before, *the title became perfect* as of the date of the grant- "ing act." (Citing *Wright* v. *Roseberry* and other cases.) It is plain, therefore, that the Court did not intend to be understood as saying that at least a perfect equitable title did not pass upon the listing, nor that it was thereafter within the power of the Secretary to divest that title.

Bagnell v. *Broderick* is, if possible, still less in point. That was an action in ejectment. Both parties claimed under a "New Madrid Certificate" which had been issued to one Robertson. A patent had been issued to Robertson upon that certificate, and the plaintiff deraigned title under that patent. The defendant sought to defeat the patent by proof that, as between him and Robertson, he was the equitable owner of the certificate and that the patent should have been issued to him. The Court held that such proof was inadmissible at law, and that the defendant's remedy, if any, was in

equity. Nothing else was decided or intimated in that case; and it is absolutely barren of the slightest suggestion on the question here at issue, unless it be the language on page 451, which says that the patent is "the superior and conclusive "evidence of legal title," and "until it issues, the fee is in "the government." Apart from the fact that those words had nothing to do with the question in that case, they have no application here; for the Act there construed contained no present grant, but merely authorized the sufferers from certain earthquakes to "locate" lands in lieu of the lands destroyed. Their rights were, therefore, identical in substance with those of pre-emption and homestead claimants, and subject to similar rules.

These, as we have said, are the only cases cited by the Court in the case now under consideration, as direct authority to the proposition that, under the swamp land Act, the lands remain within the control of the Department until patent. That they are no authority for so holding is obvious. The Court, however, refers to certain other cases as, in some measure, supporting that doctrine. They are *Cornelius* v. *Kessel*, 128 U. S. 456; *Orchard* v. *Alexander*, 157 U. S. 372; *Parsons* v. *Venzke*, 164 U. S. 89; and *Knight* v. *United Land Association*, 142 U. S. 161. The only question involved or considered in those cases was as to the supervisory power of the Secretary of the Interior *over the acts of his subordinate officers*. All that they decide was that no act of any such *subordinate officer* could be considered final, in such sense as to be beyond the control of the Secretary. This is so, because the Secretary is the head of the Department, and, as such, has been vested by Congress with general supervisory powers. Such cases, of course, can have no application where, as here, *the Secretary himself* has performed an act required by law.

The question whether that act is final or not, cannot be solved by considering his *supervisory* power. It is significant in this connection that, in *Orchard* v. *Alexander*, (p. 384,) the Court very strongly intimated, if it did not expressly decide, that, if the section of the pre-emption law declaring that proof of settlement and improvement should be made to the satisfaction of the local land officers, had stood alone, their decision would be final. The Court said: "It was competent "for Congress to give finality to their determinations, *and* "*having given them the power to determine, and made no pro-* "*vision for any review, it naturally followed that their judg-* "*ment was final.*"

The Court also refers to *Miller* v. *Kerr*, 7 Wheat. 1, as holding that, before patent, "the person who acquires an "equity holds a right subject to examination." The Court, in using that language, referred merely to an examination *by a court:* and it did not, and could not in that case, decide anything about an examination by the Department, for there was no such question there.

We have thus considered all the cases cited in the *Michigan Land & Lumber Co.'s* case which could possibly be supposed to bear on this particular question; and we believe that the Court, upon reflection, will agree with us that they furnish no support to that decision, much less any ground for departing from an old and well-established rule. We are not prepared to say that the *judgment* in that case was not right upon the merits. All that we claim is that it did not need or depend on a decision of this question, and that the court was in error in these particular views.

After all, is it not perfectly plain that a consideration of the powers of the Land Department under the pre-emption,

homestead, and kindred statutes, can afford no analogy in cases arising under Acts of direct grant? When Congress *grants* lands, they become the property of the grantee; and the Land Department can have no jurisdiction over them, except such as is expressly conferred by the granting Act. It is conceded on all hands that, if this Act had made no reference to a patent, the *legal title* would have passed immediately upon the listing. How the provision for a patent can affect the question here, we cannot understand. The question is not whether the State, before patent, has a strictly legal title. It is merely whether the *identification* of the lands by a *list* made according to the Act, does not perfect the grant *so that the State is then absolutely entitled to a patent.* If it is so absolutely entitled, no officer of the Government can deprive it of that right.

The defendant's contentions.

The principal argument made on behalf of the defendant in the court below was that the Secretary has at any rate the power to set aside a listing procured by *fraud*, and that, as the bill does not show the grounds upon which Secretary Vilas acted, the Court has a right to presume that he did cancel the list issued by Secretary Teller, on that ground. Even if the premise so assumed were correct, the conclusion contended for would not follow.

We have shown, and we believe the Court will hold, that the Secretary has no *general* power to set aside such a list. If it be true that he has such power in cases of fraud, that is an exception to the general rule. He who relies on an exception, must plead it; and especially is this the case when the existence of the exceptional fact is necessary to confer jurisdiction. Fraud is never, under any possible circumstances,

presumed: and the case made by the bill, therefore, *prima facie* entitles the plaintiff to relief. If, then, the existence of fraud would warrant the Secretary in setting aside the list, the defendant should set up such fact by answer. Since, on no view of the case, can it be claimed that the Secretary has any *arbitrary* power in the premises, (*Cornelius* v. *Kessel*, *supra*,) he could not defend by a mere *pretense* of fraud. If fraud is relied on in support of his action, it would be for the Court to say whether or not it existed, in such a sense as to confer upon him any such power. The existence of such fraud cannot be presumed on demurrer.

But we deny the correctness of the premise thus assumed. The moment it is admitted, as we think it must be admitted, that the listing conferred upon the State a *right* equivalent to a patent, it follows that the Secretary can no more set aside a list on the ground of fraud, than he could cancel a patent for that reason. "That presents a *judicial* question, and requires the judgment of a court." That proposition was so fully discussed and decided in *Noble* v. *Union River Logging R. Co.*, *supra*, that we need do no more than refer the Court to the opinion in that case on that point. We are unable to see how the slightest distinction can be drawn between that case and this. .

In saying this, we desire to limit our proposition to the power of the Secretary. We say that *he* has not the power to act *judicially* in that matter, and thus *conclude* the rights of the plaintiff. The question of fraud is one pre-eminently to be judged of by a court. Where a party has no vested rights, as against the United States, the land officers may, and must in many cases, hear and determine charges of fraud. But where such rights have once vested,

to permit the Land Department to divest them on the alleged ground of fraud, would be contrary to the fundamental distinctions between the functions of the different departments of government. Besides being a mere ministerial officer, the Secretary of the Interior has no power to compel the attendance of witnesses or the production of papers, nor the necessary judicial machinery to determine the equitable defenses of *bona fide* purchase and the like. Before such a tribunal, the parties would be well-nigh powerless, and the greatest injustice might be, and probably would be, done. Surely, such a power, not conferred either expressly or by any necessary implication, should not be inferred to exist, without a stronger warrant than has been asserted before this Court. We therefore submit that no such question can arise in this case. If any fraud has been practiced, it is competent for the Government to maintain a suit in equity to cancel the list on that ground. In such a suit, and only in such a suit, can the rights of both parties be adequately protected. But the Government, having granted the land, has no more power to be the judge in its own case, than a private grantor would have. Like any other party to a contract, it must submit its rights to the judgment of the courts.

We therefore respectfully submit that the decree of the Court of Appeals should be reversed, with directions to that court to reverse the decree of the Supreme Court of the District.

Respectfully submitted,

CHARLES A. KEIGWIN,
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W. B. TREADWELL,
Of Counsel.

Brief of City. Sec. Wm Bowen for Appellee.

Office Supreme Court U. S.
FILED
FEB 23 1899
JAMES H. McKENNEY

Filed Feb. 23, 1899.

In the Supreme Court of the United States.

OCTOBER TERM, 1898.

DAVID BROWN, APPELLANT,
v.
CORNELIUS N. BLISS, SECRETARY OF the Interior, appellee. } No. 581.

BRIEF FOR APPELLEE.

In the Supreme Court of the United States.

OCTOBER TERM, 1898.

DAVID BROWN, APPELLANT,
v.
CORNELIUS N. BLISS, SECRETARY OF the Interior, appellee. } No. 581.

BRIEF FOR APPELLEE.

STATEMENT.

This is an appeal from a decree of the court of appeals of the District of Columbia, affirming a decree of the supreme court of the District (Justice Cox) sustaining a demurrer to and dismissing a bill for an injunction restraining Cornelius N. Bliss, as Secretary of the Interior, from disposing of certain described lands in Harney County, Oreg., as public lands of the United States.

The appellant, David Brown, claims title to these lands under the swamp-land grant to the State of Oregon.

The act of September 28, 1850 (9 Stat., 519), granted to the State of Arkansas "the whole of those swamp

and overflowed lands made unfit thereby for cultivation, which shall remain unsold at the passage of this act," and in its second section provided:

> That it shall be the duty of the Secretary of the Interior, as soon as may be practicable after the passage of this act, to make out an accurate list and plats of the lands described as aforesaid, and transmit the same to the governor of the State of Arkansas, and, at the request of said governor, cause a patent to be issued to the State therefor; and on that patent, the fee simple to said lands shall vest in the said State of Arkansas, subject to the disposal of the legislature thereof.

Section 4 enlarged the operation of the act by making it applicable to other States in which such lands were situated.

By the act of March 12, 1860 (12 Stat., 3), the provisions of the act of September 28, 1850, were, with some limitations not material to this controversy, extended to the then recently admitted States of Minnesota and Oregon.

The allegations of the bill may be summarized as follows:

1. That Henry M. Teller, as Secretary of the Interior, adjudged and determined that the lands in controversy were swamp and overflowed lands inuring to the State under the swamp-land grant, and that "*then and there, on the 16th day of September, A. D. 1882*," Mr. Teller, as such Secretary, made out an accurate list and plats of said lands, together with other lands embraced in said determination, and transmitted the same to the governor of the State of Oregon, the list being denominated as "List No. 5." (Paragraph 4 of bill, printed record, p. 2.)

2. That Mr. Teller was succeeded as Secretary of the Interior by Lucius Q. C. Lamar March 5, 1885, but up

to the time of such succession no proceeding whatever had been initiated looking to the annulment, cancellation, or suspension of said "List No. 5," or looking to the revocation, alteration, or modification of Secretary Teller's action in approving said list and adjudging and determining that the lands described therein were swamp and overflowed, within the meaning of the acts aforesaid. (Paragraphs 5 and 6 of bill, printed record, p. 2.)

3. That Mr. Lamar was succeeded as Secretary of the Interior by William F. Vilas, December 6, 1887, and that on December 27, 1888, Mr. Vilas, as such Secretary, annulled, canceled, and revoked said "List No. 5," annulled and revoked the determination of his predecessor in office, Mr. Teller, that the lands in controversy were swamp and overflowed, and himself adjudged and determined that said lands were not swamp and overflowed. (Paragraphs 9 and 10 of bill, printed record, p. 4.)

4. That thereafter divers proceedings were taken before the Secretary of the Interior and in the General Land Office by the State of Oregon, and by the grantors of the plaintiff to set aside and have held for naught the said action of Secretary Vilas, which proceedings came to an end within one year before the filing of the bill, and that the present Secretary of the Interior, Mr. Bliss, is proceeding to put in force and carry out the action of Secretary Vilas and hold the lands described in the bill to be public lands of the United States, subject to entry under the laws thereof. (Paragraphs 11 and 12 of bill, printed record, p. 4.)

5. "That upon the approval and transmission of the said 'List No. 5' by the said Henry M. Teller as such

Secretary * * * the title to said lands vested in fee in the State of Oregon and its assignees * * * so that thereafter it was not within the power of the then Secretary of the Interior or of any of his successors in office, or of any officer of the Government of the United States, effectively to revoke such approval or to revoke or annul the orders, rulings, and determinations made in that behalf by the said Henry M. Teller as such Secretary * * * or to injuriously affect the rights of the State of Oregon or of its assignees or of this plaintiff to the lands aforesaid." (Paragraph 13 of bill, printed record, p. 4.)

6. That *July 26, 1880*, one H. C. Owen purchased from the State of Oregon the lands described in the bill; that thereafter by divers mesne conveyances the title of Owen vested in the plaintiff, and April 4, 1898, the State of Oregon, in pursuance of said sale and conveyances, made, executed, and delivered to the plaintiff its patent for said lands. (Paragraphs 7 and 8 of bill, printed record, p. 3.)

The prayer of the bill is that the action of Secretary Vilas of December 27, 1888, so far as the same affects the lands in controversy, be canceled and annulled by the court and declared void and of no effect; and that Mr. Bliss, as Secretary of the Interior, and the subordinate officers of the Land Department, be restrained and enjoined from executing or carrying into effect the said action of Secretary Vilas, and from dealing with said lands as public lands of the United States, and from in any way interfering with or molesting the plaintiff in his title. (Printed record, p. 5.)

ARGUMENT.

I. *The bill makes no claim that Brown or any of his grantors purchased on the faith of Secretary Teller's listing of the lands to the State.*

That Secretary Teller's action, September 16, 1882, could not have been an inducement to Owen's purchase from the State, July 26, 1880, is obvious, and yet plaintiff claims through that purchase. After stating that Owen purchased the lands from the State July 26, 1880, the bill proceeds (paragraph 8, printed record, p. 3):

> That thereafter, by diverse mesne conveyances, the title of the said H. C. Owen to the lands aforesaid vested in this plaintiff, and on the 4th day of April, A. D. 1898, the State of Oregon, in pursuance of said sale and conveyances, made, executed, and delivered to this plaintiff its patent, in due form of law, under the seal of said State, for the lands aforesaid.

The date of the patent from the State to plaintiff is thus given as April 4, 1898, but when the mesne conveyances were made by which Owen's title vested in plaintiff is not stated. In a subsequent portion of the bill there is a pretty strong intimation that the plaintiff's purchase was subsequent to Secretary Vilas's cancellation of "List No. 5." Paragraph 10 (printed record, p. 4) recites the action of Mr. Vilas as Secretary, and then paragraph 11 proceeds:

> That *thereafter*, as plaintiff is informed and believes, divers proceedings were taken before the said Secretary of the Interior and in the General Land Office of the United States *by the State of Oregon and by the grantors of this plaintiff* to set aside and have held for naught the orders and rulings so made by the said William F. Vilas as such Secretary of the Interior, which proceedings came to an end within one year last past.

The bill thus alleges that the proceedings to obtain a setting aside of Secretary Vilas's action were had on application made "by the State of Oregon and by the grantors of this plaintiff," and thereby impliedly states that the plaintiff's grantors and not the plaintiff were at that time the parties in interest. Aside from this, the bill fixes only two points of time in connection with the purchases and conveyances therein mentioned; one is that Owen purchased from the State July 26, 1880, two years before Secretary Teller's action, and the other that the State patented the lands directly to the plaintiff April 4, 1898, almost ten years after Secretary Vilas's action.

Sometime between Owen's purchase and the State's patent to plaintiff the lands were transferred by "divers mesne conveyances" from Owen to the plaintiff, but whether these mesne conveyances were made before or after Secretary Teller's action in listing the lands to the State, and whether they were made before or after Secretary Vilas's action in canceling the list are matters upon which the bill is entirely silent; nor does it even formally allege that plaintiff or any of his grantors purchased in reliance upon the listing by Secretary Teller.

II. *If these lands had been purchased on the faith of the listing thereof by Secretary Teller, the lands being unpatented at the time, the purchaser would only have acquired an equity which he would have held subject to examination, as shown by Michigan Land and Lumber Co.* **v.** *Rust, infra.*

In the absence of a statute to that effect there could not in law be a *bona fide* purchase of these lands as against the Government while it retains the legal title.

Generally, under the public land laws, an entry of public lands accompanied by the giving of a patent certificate passes the equitable title, but the legal title remains in the United States until the issuance of patent. One who purchases an equitable title obtains no higher or better right than that possessed by his grantor.

In *Root* v. *Shields* (1 Woolworth's Circuit Court Reports, 340, 363; 20 Fed. cases, 1160, 1167), Mr. Justice Miller considered and passed upon the rights acquired by purchase after entry and patent certificate but before issuance of patent. Justice Miller there said:

> It is further insisted on behalf of the defendants that they are *bona fide* purchasers, and that they, as such, are entitled to the protection of the court. I think it pretty clear that some at least of these defendants purchased and paid their money without any knowledge in fact of any defect in the title. Yet they are not *bona fide* purchasers, for a valuable consideration, without notice, in the sense in which the terms are employed in courts of equity. And this for several reasons.
>
> They all purchased before the issue of the patent. The more meritorious purchased after the entry had been assailed and decided against by the Land Office. But that is a circumstance not material to this consideration. Until the issue of the patent the legal title remained in the United States. Had his entry been valid, Shields would have taken only an equity. His grantees took only an equity. They did not acquire the legal title. And in order to establish in himself the character of a *bona fide* purchaser, so as to be entitled to the protection of chancery, a party must show that, in his purchase and by the conveyance to him, he acquired the legal title. If he have but an equity, it is overreached by the better equity of his adversary.

In *Craig* v. *Leiper* (24 American Decisions, 479, 482), the court said, in speaking of a similar question:

> But suppose the purchaser knows the vendor is not seized in fee, that he claims only an equity, the legal estate outstanding, and with full knowledge deals for the equity; in such case no one will pretend that the vendee can rely upon the plea that he is an innocent purchaser without notice; the main requisite is wanting—that he believed the vendor seized in fee.
>
> In case of land claimed by entry in this country, every person dealing therefor is presumed to know the fact whether it has or has not been granted by the State, because this is a matter of record which ordinary diligence can ascertain and which all interested are bound to know, if material, before they contract. All the defendants, then, to this cause are presumed to have known that they were dealing for an entry only.

In *Stout* v. *Hyatt* (12 Kans., 232, 243), in passing upon a similar claim of *bona fide* purchase, the court said:

> It is claimed that the plaintiff Hyatt is a *bona fide* purchaser of said land, without any notice of a want of payment therefor, and that therefore said receipt can not be disputed. Now, it may be that the plaintiff is a *bona fide* purchaser in fact, as he claims; but we hardly think that such can be so in law. At the time the plaintiff purchased said land, no patent for the same had yet been issued. The legal title to the land was therefore still in the territory of Kansas, and was not in Hughes, the plaintiff's grantor. The plaintiff could therefore at most obtain only an equitable title from his grantor. And a party purchasing a merely equitable title must always take notice of all counter equities which may be outstanding in favor of the person holding the legal title. A party purchasing a merely equitable title can not be a *bona fide* purchaser so as to defeat prior equities existing in favor of the person holding the legal title.

In *Taylor* v. *Weston* (77 Cal., 534, 540), the court held:

> In the case before us the person through whom the respondent claims had only a contract of purchase. It is undisputed that the legal title is in the State, the very object of the proceeding being to determine who is entitled to a conveyance from the State. What is called a certificate of purchase (although treated as evidence of title as between third parties) is, as against the State, merely evidence of a contract to convey. And the respondent must establish his right against the State, each party in this kind of proceeding being an actor. (*Dillon* v. *Saloude*, 68 Cal., 269.) Hence, the rule as to the purchase of equitable interests applies. And it has been applied by courts of authority to cases in relation to the acquisition of public lands. In *Root* v. *Shields*, 1 Woolw., 364, it was applied by Mr. Justice Miller to the assignee of a preemption claim. In *Craig* v. *Leiper*, 2 Yerg., 193, 24 Am. Dec., 479, it was applied in an able opinion by Catron, J., to the grantee of the rights acquired by an entry and land warrant under the early land laws. In *Stout* v. *Hyatt*, 13 Kan., 243, 244, it was applied to the assignee of a preemption claim for school lands under the territorial laws of Kansas. And in *Maghee* v. *Robinson*, 98 Ill., 466, it was applied to the assignee of a swamp-land certificate of purchase. (See also Chrisinger's Case, 4 Decisions of Department of Interior, 347.) We think, therefore, that the court below erred in holding the defendant Payne to be protected by the rule as to *bona fide* purchasers.
>
> It is hardly necessary to add that in what we have said we have no reference to cases where the legal title has passed to the person through whom the *bona fide* purchaser claims.

In *United States* v. *Johnson et al.* (5 L. D., 442, 443) Acting Secretary Muldrow said:

> It is further insisted by the appellant Corrigan that he is an innocent purchaser without notice,

and therefore the cancellation of said entries could not affect his rights. But this contention can not be maintained. All purchasers of lands after entry and prior to the issuance of patents are charged with notice that said entries must be confirmed by your office, and if the entryman has imposed upon the register and receiver with false and fraudulent proof and thereby obtained a certificate of entry, the purchaser can acquire no better title than the vendor possessed.

In *Smith* v. *Custer et al.* (8 L. D., 269, 278) Secretary Vilas held:

> Whatever claim to patent he possesses by virtue of his payment and certificate is dependent upon the further action of the department and its future finding of the existence of the conditions, and his compliance in fact with the prerequisites prescribed by law to the rightful acquisition of the public land he claims. This being so, it is plain that the purchaser can acquire from the entryman no greater estate or right than the entryman possesses. The purchaser is chargeable with knowledge of the law, which includes knowledge of this law; and is chargeable with knowledge of the state of the title which he buys, in so far, at least, as that the legal title remains in the United States, subject to the necessary inquiry and determination by the land office and department upon which a patent may issue. He is not an "innocent purchaser," so far as there may exist reasons why that patent should not issue. He buys subject to the risk of the consequences of the inquiry depending in the department. He buys a title *sub judice*. At the most, it is but an equitable title, the legal title being in the Government. It is a familiar rule that the purchaser of an equitable title takes and holds it subject to all equities upon it in the hands of his vendor, and has no better standing than he. (*Boones* v. *Chiles*, 10 Peters, 177; *Root* v. *Shields*, 1 Woolworth, 340.)

In *Traveler's Insurance Co.* (9 L. D., 316, 320) First Assistant Secretary Chandler said:

> None of these cases conflict with the doctrine that a duplicate receipt is equivalent to a patent when rightfully and lawfully obtained, and no decision of a supreme court of any State or the United States, that I am able to find, goes so far as to hold the Government may not protect itself against fraud in the entry at any time before patent issues. Such is the universal holding of such courts.
>
> Upon the second proposition contended for by counsel, the rule of the law is that there can be no such thing as a *bona fide* purchase of Government lands prior to the issuing of patent. That one who deals with such lands under such circumstances takes only the equity of the claimant, charged with notice of the law and the supervisory control of the Commissioner of the General Land Office over the rulings and decisions of the register and receiver, acts at his peril in his purchase, has applied to him the rule of *caveat emptor* in all its rigor, as it affects the rights of the entryman with reference to qualifications, and compliance with the preemption law as to residence and cultivation—standing, so to speak, in his shoes, having no greater rights or equities than the entryman from whom he purchased.

In *United States* v. *Allard et al.* (14 L. D., 392, 403), Secretary Noble held:

> Many cases have arisen before this Department and in the courts, under the general land laws, involving the rights of purchasers before patent, without notice of defects in the title, subsequently found to have existed at the time of the purchase. In such cases, as a general rule, it has been held, in effect, (1) that the action of the local officers in accepting proof and payment, and issuing duplicate receiver's receipt, is not a final adjudication in favor

of the entryman, and does not preclude the Land Department from subsequently inquiring into the good faith of the transaction, and canceling the entry, if found to have been obtained through fraud, or that the entryman has failed in any particular to comply with the requirements of the law; (2) that, even when an entry is made in good faith, and the law in all respects has been complied with, the entryman, by his receiver's duplicate receipt, takes only an equity, the legal title to the land remaining in the Government until patent issues; and (3) that a purchaser prior to patent takes only the equity of the entryman, is charged with notice of the law and the supervisory control of the Land Department over the action of the local officers, and stands in no better position than the entryman himself. A long line of decisions support these propositions as applied to the public land laws as a whole, and in the later cases they have been adhered to with marked uniformity.

III. *It is significant that the bill contains no allegation and makes no claim that these lands were in fact swamp and overflowed in character.*

The grant to the State of Oregon is limited to "swamp and overflowed lands made unfit thereby for cultivation." Lands which are not of that character do not pass under this grant. The listing to the State of lands which are not swamp and overflowed is in violation of law, and the issuance of a patent upon such list would be a perpetuation of the unauthorized and unlawful act.

IV. *The appellant is not entitled to any relief upon the allegations of his bill if, by any proceeding in the Land Department, Secretary Vilas could have lawfully canceled and revoked the listing of these lands to the State of Oregon.*

In this connection the allegations of the bill are: (1) that Secretary Teller determined that the lands were

swamp and overflowed, inuring to the State under the swamp-land grant, and listed them to the State as such; (2) that when he retired from office no proceeding whatever had been initiated looking to the revocation of said determination or the cancellation of said list; and (3) that Secretary Vilas subsequently revoked Secretary Teller's determination as to the character of the lands and canceled the listing thereof to the State.

The bill does not state which of these apparently conflicting determinations accords with the true character and condition of the lands at the date of the grant; nor does it state what evidence or showing induced the determination and action of either Secretary. It mentions Mr. Lamar's incumbency of the office of Secretary of the Interior between the respective terms of Mr. Teller and Mr. Vilas, but does not state whether any proceeding affecting the title to these lands was initiated or had while Mr. Lamar was such Secretary. There is no allegation that Secretary Vilas's determination and action were arbitrary or without notice to the State and its grantees or were without a full and fair hearing.

Consistently with every allegation in the bill, a full and fair hearing with full notice to the State and its grantees may have been had under the direction of Secretary Lamar or Secretary Vilas, wherein it was indisputably shown and ascertained that the determination and action of Secretary Teller were the result of an obvious and serious mistake or inadvertence, or were induced by a report of a subordinate in the Land Department charged with the duty of ascertaining and reporting the true character and condition of the lands at the date of the grant, but who, for the purpose of assisting

the State's grantee in obtaining the Government title, falsely, fraudulently, and corruptly represented to Mr. Teller, as such Secretary, that said lands were swamp and overflowed within the meaning of the granting acts, when in truth and in fact they were not of that character or in that condition.

The law uniformly indulges a presumption of correct official conduct and action until the contrary is shown, and, therefore, if by any proceeding in the Land Department it would have been competent for Secretary Vilas, to vacate the listing of said lands to the State and to determine their true character and condition, it will be presumed that an appropriate proceeding was regularly had, and that the facts then ascertained justified his action, there being no showing to the contrary.

V. Under the acts making the swamp-land grant to Oregon the legal title remains in the United States until the issuance of patent to the State, and until then the grant is in process of administration and the land is subject to the jurisdiction of the Land Department, of which the Secretary of the Interior is the head. The lands in controversy not being patented, Secretary Vilas' action was fully within the scope of his authority. The duties and authority of the Secretary of the Interior are impersonal and not dependent upon who happens to be filling the office for the time being. The fact that the Secretary who made the list is not the one who revoked it is not material.

The question as to when the jurisdiction and authority of the Land Department, of which the Secretary of Interior is the head, over proceedings for the acquisition of public lands ceases and terminates, has been the subject of both judicial and departmental investiga-

tion. The case of *Michigan Land and Lumber Co.* v. *Rust* (168 U. S., 589, 591, 592) involved the authority of the Land Department over the identification of the particular lands passing under the swamp-land act of September 28, 1850, *supra*, and the finality of the action of the Secretary of the Interior in approving and certifying to the governor of the State a list of such lands. All the lands in a certain district in the State of Michigan which were believed to be swamp and overflowed in character were listed to the State by the Secretary of the Interior October 27, 1853, and the list was transmitted to the governor of the State January 13, 1854.

It being ascertained that the information (an official survey) upon which the first listing was based was inaccurate and erroneous, the Secretary of the Interior, May 18, 1866, made a second list, embracing all the lands ascertained by him to be swamp and overflowed in that district, and the same was transmitted to the governor of the State May 26, 1866. The land in controversy in that case was embraced in the first list, but not in the second one, which it was claimed had superseded the first. While the fact that there had been a change of Secretaries between the making of the two lists is not specially mentioned in the decision, it is shown by the printed record in that case, at pages 39 and 179, that the first list was made by Secretary McClelland and the second by Secretary Harlan, so that the effect of a change in Secretaries was fully presented by the case. The court said:

> The act of 1850 made a grant *in præsenti:* in other words, the title then passed to all lands which at that date were swamp lands, and the only matters thereafter to be considered were those of identification. (*Railroad Company* v. *Smith*, 9 Wall., 95;

French v. *Fyan*, 93 U. S., 169; *Martin* v. *Marks*, 97 U. S., 345; *Rice* v. *Sioux City and St. Paul Railroad*, 110 U. S., 695; *Wright* v. *Roseberry*, 121 U. S., 488; *Tubbs* v. *Wilhoit*, 138 U. S., 134.) But while the act operated as a grant *in præsenti*, the determination of what lands were swamp lands was intrusted to the Secretary of the Interior. Section 2 contains this provision:

"That it shall be the duty of the Secretary of the Interior, as soon as may be practicable after the passage of this act, to make out an accurate list and plats of the lands described as aforesaid, and transmit the same to the governor of the State of Arkansas, and, at the request of said governor, cause a patent to be issued to the State therefor; and on that patent the fee simple to said lands shall vest in said State of Arkansas, subject to the disposal of the legislature thereof."

* * * * *

It will be perceived that the act contemplated the issue of a patent as the means of transferring the legal title. In *Rogers Locomotive Works* v. *American Emigrant Co.* (164 U. S., 559, 574) it was said, speaking in reference to this matter, and after a full review of the previous authorities: "When he" (that is, the Secretary of the Interior) "made such identification, then, and not before, the State was entitled to a patent, and 'on such patent' the fee simple title vested in the State. The State's title was at the outset an inchoate one, and did not become perfect, as of the date of the act, until a patent was issued."

Generally speaking, while the legal title remains in the United States, the grant is in process of administration, and the land is subject to the jurisdiction of the land department of the Government. It is true a patent is not always necessary for the transfer of the legal title. Sometimes an act of Congress will pass the fee. (*Strother* v. *Lucas*, 12 Pet., 410, 454; *Grignon's Lessee* v. *Astor*, 2 How.,

319; *Chouteau* v. *Eckhart*, 2 How., 344, 372; *Glasgow* v. *Hortiz*, 1 Black, 595; *Langdeau* v. *Hanes*, 21 Wall., 521; *Ryan* v. *Carter*, 93 U. S., 78.) Sometimes a certification of a list of lands to the grantee is declared to be operative to transfer such title (Rev. Stat., sec. 2449; *Frasher* v. *O'Connor*, 115 U. S., 102); but wherever the granting act specifically provides for the issue of a patent, then the rule is that the legal title remains in the Government until the issue of the patent (*Bagnell* v. *Broderick*, 13 Pet., 436, 450); and while so remaining the grant is in process of administration, and the jurisdiction of the land department is not lost.

It is, of course, not pretended that when an equitable title has passed, the Land Department has power to arbitrarily destroy that equitable title. It has jurisdiction, however, after proper notice to the party claiming such equitable title, and upon a hearing, to determine the question whether or not such title has passed. (*Cornelius* v. *Kessel*, 128 U. S., 456; *Orchard* v. *Alexander*, 157 U. S., 372, 383; *Parsons* v. *Venzke*, 164 U. S., 89.) In other words, the power of the Department to inquire into the extent and validity of the rights claimed against the Government does not cease until the legal title has passed. * * * After the issue of the patent the matter becomes subject to inquiry only in the courts and by judicial proceedings. * * *

In *Moore* v. *Robbins* (96 U. S., 530), it was said:

While conceding for the present, to the fullest extent, that when there is a question of contested right between private parties to receive from the United States a patent for any part of the public lands, it belongs to the head of the Land Department to decide that question, it is equally clear that when the patent had been awarded to one of the contestants, and has been issued, delivered, and accepted, all right to control the title or to decide on the right to the title has passed from the land

> office. * * * With the title passes away all authority or control of the executive department over the land, and over the title which it has conveyed.

In *United States* v. *Schurz* (102 U. S., 378, 395, 402), it was said:

> The Constitution of the United States declares that Congress shall have power to dispose of and make all needful rules and regulations respecting the territory and other property belonging to the United States. Under this provision the sale of the public lands was placed by statute under the control of the Secretary of the Interior. To aid him in the performance of this duty, a bureau was created, at the head of which is the Commissioner of the General Land Office, with many subordinates. To them, as a special tribunal, Congress confided the execution of the laws which regulate the surveying, the selling, and the general care of these lands.
>
> Congress has also enacted a system of laws by which rights to these lands may be acquired, and the title of the Government conveyed to the citizen. This court has with a strong hand upheld the doctrine that so long as the legal title to these lands remained in the United States, and the proceedings for acquiring it were as yet *in fieri*, the courts would not interfere to control the exercise of the power thus vested in that tribunal. To that doctrine we still adhere.
>
> * * * * *
>
> From the very nature of the functions performed by these officers, and from the fact that a transfer of the title from the United States to another owner follows their favorable action, it must result that at some stage or other of the proceedings their authority in the matter ceases.
>
> It is equally clear that this period is, at the latest, precisely when the last act in the series

essential to the transfer of title has been performed. Whenever this takes place the land has ceased to be the land of the Government; or, to speak in technical language, the legal title has passed from the Government, and the power of these officers to deal with it has also passed away.

This case (p. 401) also speaks of a decision as final when it is "made and recorded in the shape of the patent."

In *Smelting Co.* v. *Kemp* (104 U. S., 636, 640) the court said:

> The patent of the United States is the conveyance by which the nation passes its title to portions of the public domain. For the transfer of that title the law has made numerous provisions, designating the persons who may acquire it and the terms of its acquisition. That the provisions may be properly carried out, a land department, as part of the administrative and executive branch of the Government, has been created to supervise all the various proceedings taken to obtain the title, from their commencement to their close. In the course of their duty the officers of that department are constantly called upon to hear testimony as to matters presented for their consideration, and pass upon its competency, credibility, and weight. In that respect they exercise a judicial function, and, therefore, it has been held in various instances by this court that their judgment as to matters of fact, properly determinable by them, is conclusive when brought to notice in a collateral proceeding. Their judgment in such cases is, like that of other special tribunals upon matters within their exclusive jurisdiction, unassailable except by a direct proceeding for its correction or annulment. The execution and record of the patent are the final acts of the officers of the Government for the transfer of its title, and, as they can be lawfully performed only after cer-

> tain steps have been taken, that instrument, duly signed, countersigned, and sealed, not merely operates to pass the title, but is in the nature of an official declaration by that branch of the Government to which the alienation of the public lands, under the law, is intrusted, that all the requirements preliminary to its issue have been complied with.

In *New Orleans* v. *Paine* (147 U. S., 261, 266), in ruling upon the finality of decisions of the Land Department, the court says:

> Until the matter is closed by final action, the proceedings of an officer of a department are as much open to review or reversal by himself, or his successor, as are the interlocutory decrees of a court open to review upon the final hearing.

This language was quoted with approval in *Michigan Land and Lumber Company* v. *Rust*, *supra*, at page 594.

In *Beley* v. *Napthaly* (169 U. S., 353, 364), it is said:

> The fact that a decision refusing the patent was made by one Secretary of the Interior, and, upon a rehearing, a decision granting the patent was made by another Secretary of the Interior, is not material in a case like this. It is not a personal but an official hearing and decision, and it is made by the Secretary of the Interior as such Secretary, and not by an individual who happens at the time to fill that office, and the application for a rehearing may be made to the successor in office of the person who made the original decision, provided it could have been made to the latter had he remained in office.

Then, referring to *United States* v. *Stone* (2 Wall., 525) and *Noble* v. *Union River Logging R. R. Co.* (147 U. S., 165), two of the cases relied upon here by appellant, the court said:

> The case of *United States* v. *Stone* (2 Wall., 525) has no bearing adverse to this proposition. In that

case it was stated that a patent is but evidence of a grant, and the officer who issues it acts ministerially and not judicially; that if he issues a patent for land reserved from sale by law, such patent is void for want of authority, but that one officer of the Land Office is not competent to cancel or annul the act of his predecessor; that is a judicial act and requires the judgment of a court. The power to cancel or annul in that case meant the power to annul a patent issued by a predecessor, and this court held no such power existed. The officer originally issuing it would have had no greater power to annul the patent than had his successor.

Neither does *Noble* v. *Union River Logging Railroad* (147 U. S., 165) touch the case. The principle therein decided was in substance the same as in the Stone Case, *supra*. The control of the department necessarily ceased the moment the title passed from the Government. It was not a question whether a successor was able to do the act which the original officer might have done, but it was the announcement of the principle that no officer, after the title had actually passed, had any power over the matter whatever. After the Secretary of the Interior had approved the map, as provided for in the act of Congress under which the proceedings were taken by the company, the first section of that act vested the right of way in the company. This was equivalent to a patent, and no revocation could thereafter be permitted.

The following provisions in the Revised Statutes of the United States have reference to the authority of the Secretary of the Interior over proceedings for the disposition of public lands:

> SEC. 441. The Secretary of the Interior is charged with the supervision of public business relating to the following subjects:
>
> * * * * *

Second. The public lands, including mines.

* * * * *

SEC. 453. The Commissioner of the General Land Office shall perform, under the direction of the Secretary of the Interior, all executive duties appertaining to the surveying and sale of the public lands of the United States or in anywise respecting such public lands, and also such as relate to private claims of land, and the issuing of patents for all agents [grants] of land under the authority of the Government.

SEC. 2478. The Commissioner of the General Land Office, under the direction of the Secretary of the Interior, is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of this title [public lands] not otherwise specially provided for.

In *Knight* v. *United States Land Association* (142 U. S., 161, 177, 178, 181), in construing these statutory provisions and in discussing the jurisdiction and power of the Secretary of the Interior over proceedings for the disposition of public lands, the court said:

> The phrase, "under the direction of the Secretary of the Interior," as used in these sections of the statutes, is not meaningless, but was intended as an expression in general terms of the power of the Secretary to supervise and control the extensive operations of the Land Department of which he is the head. It means that, in the important matters relating to the sale and disposition of the public domain, the surveying of private land claims and the issuing of patents thereon, and the administration of the trusts devolving upon the Government, by reason of the laws of Congress or under treaty stipulations, respecting the public domain, the Secretary of the Interior is the supervising agent of the Government to do justice to all claim-

ants and preserve the rights of the people of the United States.

* * * * *

The statutes, in placing the whole business of the Department under the supervision of the Secretary, invest him with authority to review, reverse, amend, annul, or affirm all proceedings in the Department having for their ultimate object * * * the alienation of any portion of the public lands, or the adjustment of private claims to lands, with a just regard to the rights of the public and of private parties. Such supervision may be exercised by direct orders or by review on appeals. The mode in which the supervision shall be exercised, in the absence of statutory direction, may be prescribed by such rules and regulations as the Secretary may adopt. When proceedings affecting titles to lands are before the Department the power of supervision may be exercised by the Secretary, whether these proceedings are called to his attention by formal notice or by appeal. It is sufficient that they are brought to his notice. The rules prescribed are designed to facilitate the Department in the dispatch of business, not to defeat the supervision of the Secretary. For example, if, when a patent is about to issue, the Secretary should discover a fatal defect in the proceedings, or that by reason of some newly ascertained fact the patent, if issued, would have to be annulled, and that it would be his duty to ask the Attorney General to institute proceedings for its annulment, it would hardly be seriously contended that the Secretary might not interfere and prevent the execution of the patent. He could not be obliged to sit quietly and allow a proceeding to be consummated which it would be immediately his duty to ask the Attorney-General to take measures to annul.

* * * * *

The Secretary is the guardian of the people of the United States over the public lands. The obli-

> gations of his oath of office oblige him to see that the law is carried out, and that none of the public domain is wasted or is disposed of to a party not entitled to it. He represents the Government, which is a party in interest in every case involving the survey and disposal of the public lands.

In *Williams* v. *United States* (138 U. S., 514, 524), it is said:

> It is obvious, it is common knowledge, that in the administration of such large and varied interests as are intrusted to the Land Department, matters not foreseen, equities not anticipated, and which are therefore not provided for by express statute, may sometimes arise, and, therefore, that the Secretary of the Interior is given that superintending and supervising power which will enable him, in the face of these unexpected contingencies, to do justice.

The case of *Warner Valley Stock Co.* v. *Smith* (9 App. D. C., 187), is essentially the same as the case at bar, excepting that there the Secretary who listed the lands to the State revoked his own listing, while in the case at bar the listing was revoked by a succeeding Secretary. It was held in that case that under the acts of September 28, 1850, and March 12, 1860, the fee-simple title does not vest in the State until the issuance of patent, and that where patent has not issued it is competent for a Secretary of the Interior to revoke his listing of lands to the State, with a view to redetermining their character.

The principles announced in these decisions of the Supreme Court are applied by the Secretaries of the Interior in the administration of the public land laws.

In this connection it is important to note the difference between the swamp-land acts of March 2, 1849 (9 Stat., 352), and September 28, 1850 (9 Stat., 519).

The earlier act contained no provision for the issuance of patents, but, after directing that the lands should be designated in lists to be approved by the Secretary of the Treasury (afterwards Secretary of the Interior), contained the following declaration respecting the final passing of title: "And *on that approval* the fee simple to said lands shall vest in the said State of Louisiana, subject to the disposal of the legislature thereof."

The later act, which controls the case at bar, is not silent respecting the issuance of patent, but, after directing the listing of the lands by the Secretary of the Interior and the issuance of patent therefor at the request of the governor, contains the following declaration: "And *on that patent* the fee simple to said lands shall vest in the said State, * * * subject to the disposal of the legislature thereof." As early as December 23, 1851, Secretary Stuart, in considering these two acts, said (1 Lester Land Laws, 549):

> I have carefully reviewed my affirmance of your decision in regard to the proper construction of the acts of 2d March, 1849 (No. 166), and 28th September, 1850 (No. 182). * * * The first question involved in this case is as to the period when the grants take effect; whether it be the date of the law or the date of the approval of the selections by the Secretary; and the general law of 1850 enacts that the fee shall vest in the State, upon the issuing of a patent.
>
> In each case the granting clause is in the first section, and the words employed, viz, "are hereby granted," seem to me to import a grant *in præsenti*. They confer the right to the land, *though other proceedings were necessary to perfect the title. When the selections are made and approved, or the patent issued, the title therefore becomes perfect, and has relation back to the date of the grant.*

It is manifest from what was said that the Secretary meant that upon approval of the lists under the act of 1849, or upon the issuance of patent under the act of 1850, as the case might be, "the title therefore becomes perfect, and has relation back to the date of the grant."

Secretary McClelland held, January 14, 1856 (1 Lester Land Laws, 554), that—

> the approval of the list directed to be prepared *under act of 1849* exhausts the power of the Secretary of the Interior over the subject matter, and he can no more, of his own motion, revoke or cancel any part of an approved list *under that act* after it has passed from him than a patent for land.

Secretary Thompson, *referring to the act of 1850*, held, December 27, 1857 (1 Lester Land Laws, 557), that "The State authorities have a right to call for a patent or patents pursuant to certified lists, *unless fraud or mistake has been discovered.*" Secretary Thompson also made the following decision, June 25, 1859 (1 Lester Land Laws, 569):

> The list which accompanied your report of the 17th instant is herewith returned. It appears that the lands therein described pending an investigation of the fact of their being swampy or otherwise, under instructions of your office of April, 1858, were inadvertently included in lists which have been reported to me for approval and approved. The investigation having been completed and reported to your office, you now find that the tracts were in fact dry on the 28th September, 1850.
>
> Under these circumstances the proper course to pursue, I think, will be to omit these lands from the patents to be issued on confirmed [approved] swamp lists Nos. 3 and 4, in the Little Rock district, and to inform the governor of the State fully in respect to the mistake made, advising him that the

lands will be listed as falling under the grant for railroad purposes unless he should present paramount objections to that course.

In the case of *State of Oregon* (5 Land Decisions, 31, 34), in discussing his authority over a list of swamp lands certified to the State by his predecessor in office, Secretary Teller, and known as "List No. 5," Secretary Lamar said:

> Such approval and certification, however, will not conclude the Government if it be shown that it was obtained by fraud or mistake. If after such approval and certification of the list it is discovered that lands have been reported as swamp and overflowed, which in fact were not of that character, and that such lands were so reported through the false and fraudulent acts and misrepresentations of either the Government agent or others charged with the investigation of the character of such lands, and upon whose decision and report the approval and certification was obtained, such approval and certification may, upon proof of such facts, be reviewed and recalled. "Fraud vitiates the most important judicial acts when found to exist in them, and renders them void upon discovery before the proper tribunal." (*De Louis* v. *Meek*, 50 Am. Dec., 512, and notes to decision.)
>
> So, in like manner, a final decision of the Secretary may be reviewed and revoked, upon the ground of mistake; not mere error of judgment, but that character of mistake which would afford a ground of relief in a court of equity. *The courts have no jurisdiction over public lands until after the issuance of patent. Hence, before the issuance of patent, the Department of the Interior is the only tribunal having jurisdiction to review the decision of a former Secretary, or to revoke or recall its own decision, when obtained by fraud or mistake.*

In the case of *State of Oregon* (5 L. D., 374) Secretary Lamar further applied the rule announced in the decision last quoted from by citing the State of Oregon to show cause why said "List No. 5" should not be revoked and canceled on account of fraud practiced in procuring the approval thereof.

In the case of *State of Michigan* (7 L. D., 514, 523), Secretary Vilas said:

> When, however, the certification made by the Secretary is, before patenting, challenged for fraud or mistake, I think the right and duty remain with him to correct the identification according to the facts, so that the patent shall issue only for lands which were, in truth, granted by the act of Congress. To put the case strongly, is it to be presumed that any court would, by mandamus, compel the Secretary to issue the patent, when by false and fraudulent evidence he has been deceived into affixing his signature to a certification which embraced, among the tracts described, a large body of land beyond all dispute high and dry, in no part wet, swamp or overflowed, or unfit for cultivation? Or would a writ go to compel the patenting of such lands which, through accident or gross mistake, had been so included in a certified list?
>
> To suppose such a judgment possible would impute to a court the violation not only of the act of Congress, but of plain and acknowledged principles of justice. It necessarily follows that when such a case occurs the Secretary retains the power, until a patent issues, to correct his error in the attempt to identify the granted lands, by conforming his certification to the truth as discovered after it was made. It equally follows that when the Secretary has, before patent, made discovery of fraud, accident, or mistake, in consequence of which he has included in his certification lands not granted by the act of Congress, and has corrected the cer-

tification so as truly and rightly to identify the lands actually granted, the only right to a patent existing in the State, or which any court could enforce, attaches to the land actually granted and correctly identified by the amended certification. Otherwise the singular consequence would attach to the performance of this act, which is nowhere else suffered by the law, that fraud, mistake, or accident becomes, openly and undeniably, the basis of title, and the Government is defrauded of its lands by means which would be a sufficient foundation to relieve another grantor from a conveyance actually made. This reasoning seems, to my mind, indisputably to demonstrate that a right of correction, in a proper case, remains in the Secretary, even after a certification has been made, if the issuance of patent has not dispossessed him of jurisdiction.

In the case of *State of Oregon* (7 L. D., 572, 576) Secretary Vilas, in speaking of the same "List No. 5," mentioned in Secretary Lamar's decisions, *supra*, said:

Had these facts been known to Secretary Teller his certification of List No. 5 would never have been made. It was the product of a false report by an agent of the Government whom he was obliged to trust. The magnitude of the falsehood of that report is sufficient to show that it was fraudulent. It is impossible that an officer could have returned, in the discharge of his duty, as swamp and overflowed more than one-third of the lands so reported which were in fact dry, and so great a proportion of which were upon mountains or arid deserts. He was guilty of fraud if he made this return recklessly, without knowledge of the facts; but in view of his relations to the largest claimant of the lands, as to some extent disclosed by the contract shown, his action can not but be regarded more unfavorably. The Government

ought not to be, and can not be, bound by the act of certification brought about by such means. It must be revoked and canceled, as would very promptly have been done by the Secretary who signed it if the facts had been disclosed to him while in office.

Some question has been raised of my jurisdiction to make this order. This question has been repeatedly considered by my predecessors in office, and but one conclusion was ever reached. In the case of the State of Michigan, recently decided, I have expressed to some extent the reasons which seem to me to support the jurisdiction of the Department to correct such an error. To that decision I need add nothing for the purposes of this case. Suffice it to say, that unless the certification may be revoked, it would appear necessary to follow it by patent, and thus invest the State with the possession of a grant which ought immediately to be set aside by a court of equity. If such be the law, the State and her grantees are not without remedy, and my assumption of jurisdiction can be reviewed and corrected by the courts. It ought to require nothing less than a mandate from the court of last resort to compel the head of this Department, charged with the duty of caring for the interests of the Government and truly identifying the lands it has granted, to become an instrument for so great an outrage upon its grant as the facts here disclosed show a patent would be.

In State of Minnesota (6 L. D., 37) Acting Secretary Muldrow, in discussing the effect of a certification to the State of two lists of swamp lands which were alleged to have been based upon erroneous and fraudulent information, said:

The Secretary of the Interior has jurisdiction to review the decision of a former Secretary, or to revoke or recall his own decision when obtained by fraud or mistake, and if the record discloses such

facts, the Department will take jurisdiction, irrespective of the authority or jurisdiction of the Commissioner.

In the case of the State of Oregon (5 L. D., 31), involving this same question, the Department held that the approval and certification of the Secretary of swamp and overflowed lands determined affirmatively their swampy character, and such certification can not be revoked or canceled, unless it be shown that it was obtained by fraud or mistake. This decision followed the uniform ruling of the Department as to the finality of the decision of the Secretary upon such issues.

In State of Florida (12 L. D., 565), Acting Secretary Chandler, in passing upon a list of swamp lands theretofore certified to the State of Florida, said:

> From the foregoing statement of facts, it is apparent that the certification of these lands was made upon a misapprehension of the facts, and that said list would not have been certified and approved, if the facts, as shown by the records of your office, had been presented to the Secretary.
>
> Having jurisdiction over such lands until after the issuance of patent, I deem it my duty, under the facts above set forth, to revoke and cancel said certification and approval, as to the lands above mentioned.

These departmental decisions were also followed by Secretary Bliss in State of Florida (26 L. D., 117), involving Swamp-Land List No. 87, theretofore certified to the State.

The authority of one Secretary of the Interior to review or reconsider the action of a preceding Secretary is believed to be correctly stated by Secretary Bliss in *Parcher* v. *Gillen* (26 L. D., 34, 42), as follows:

> THE TRUE RULE DRAWN FROM AN EXAMINATION OF ALL OF THE AUTHORITIES IS THAT THE

JURISDICTION OF THE LAND DEPARTMENT CEASES WHERE THE JURISDICTION OF THE COURTS COMMENCES, VIZ, WHEN THE LEGAL TITLE PASSES, AND THAT THERE IS NO HIATUS BETWEEN THE TERMINATION OF THE ONE AND THE BEGINNING OF THE OTHER. UNDER THIS RULE THE LAND WILL ALWAYS BE WITHIN A JURISDICTION WHICH CAN ADMINISTER THE LAW AND PROTECT BOTH PUBLIC AND PRIVATE RIGHTS.

THE OFFICE OF THE SECRETARY OF THE INTERIOR IS A CONTINUING ONE. ITS INCUMBENTS COME AND GO, BUT THE OFFICE REMAINS. THE POWERS AND DUTIES OF THE OFFICE ARE IMPERSONAL, AND OPERATE UNIFORMLY AT ALL TIMES AND UPON ALL CONTROVERSIES WITHOUT REFERENCE TO WHO MAY BE EXERCISING THOSE POWERS OR PERFORMING THOSE DUTIES. A CHANGE IN THE PERSON HOLDING THE OFFICE DOES NOT AUTHORIZE, AND SHOULD NOT INVITE, A REVIEW OR REVERSAL OF PRIOR RULINGS OR DECISIONS; AND NEITHER DOES SUCH CHANGE PREVENT OR DEFEAT A REVIEW OR REVERSAL IN ANY INSTANCE WHERE THE SECRETARY MAKING THE RULING OR RENDERING THE DECISION, IF STILL IN OFFICE, WOULD BE IN DUTY BOUND TO REVIEW AND REVERSE HIS OWN ACT. ADMINISTRATIVE REASONS, AS WELL AS THE PRINCIPLES OF COMMON JUSTICE, REQUIRE THAT A SECRETARY SHOULD NOT DISTURB OR REVERSE PRIOR RULINGS OR DECISIONS EXCEPT WHERE IT IS AFFIRMATIVELY SHOWN THAT MANIFEST INJUSTICE HAS BEEN DONE OR THE LAW CLEARLY MISAPPLIED; BUT THIS IS EQUALLY TRUE OF HIS OWN RULINGS AND DECISIONS, AND IS NOT LIMITED TO THOSE OF HIS PREDECESSORS.

SO LONG AS THE LEGAL TITLE REMAINS IN THE GOVERNMENT THE SECRETARY OF THE INTERIOR, WHOEVER HE MAY BE, IS CHARGED WITH THE DUTY OF SEEING THAT THE LAND IS DISPOSED OF ONLY ACCORDING TO LAW. THE ISSUANCE OF A

PATENT IS THE FINAL ACT AND DECISION IN THAT DISPOSITION, AND WITH IT AND NOT BEFORE DOES THE SUPERVISORY POWER AND DUTY OF THE SECRETARY CEASE.

VI. *The case of Michigan Land and Lumber Co. v. Rust, supra, authoritatively determines that the listing of swamp lands is not the final act of identification and does not terminate the authority or jurisdiction of the Land Department, and that the identification is not finally accomplished and the authority or jurisdiction of the Land Department is not terminated until the issuance of patent.*

The extent to which this question had been presented to and considered by the court at the time of that decision is worthy of recitation in determining the effect to be given to that decision. The case of *Warner Valley Stock Co.* v. *Smith* (165 U. S., 28), involving the authority of the Secretary of the Interior to revoke and cancel a listing of lands to the State of Oregon under the swamp-land grant had been recently argued at length, both orally and in printed briefs, the arguments and citations of authority covering everything presented in the case at bar. By reason of the retirement from office of Secretary Smith the proceeding abated, and therefore no decision upon the question here presented was made in that case. In *Michigan Land & Lumber Co.* v. *Rust, supra*, coming before the court shortly thereafter the parties presented *in extenso*, both orally and in printed briefs, the same arguments and citations of authority which had been presented in *Warner Valley Stock Co.* v. *Smith*, and which are now presented in the case at bar. In the light of this repeated presentation of the question and the reference in the opinion in *Michigan Land and Lumber Co.* v. *Rust* to the identical

decisions relied upon by the appellant here, it can not be said that the decision in that case is not entitled to the respect and authoritative effect accorded to the most solemn and deliberate declarations of this court.

VI. *The facts of this case do not bring it within the limits within which the courts issue process directly against high officers of the executive branch of the Government.*

The general principle governing the issuance of injunctions against heads of Executive Departments was laid down by Mr. Justice Miller in *Gaines* v. *Thompson* (7 Wall., 347, 352–354) as follows, after discussing the earlier authorities in *mandamus* cases and showing that that writ can issue only to compel the performance of a ministerial duty:

> It may, however, be suggested that the relief sought in all those cases was through the writ of mandamus, and that the decisions are based upon the special principles applicable to the use of that writ. This is only true so far as those principles assert the general doctrine that an officer to whom public duties are confided by law is not subject to the control of the courts in the exercise of the judgment and discretion which the law reposes in him as a part of his official functions. Certain powers and duties are confided to those officers, and to them alone, and however the courts may, in ascertaining the rights of parties in suits properly before them, pass upon the legality of their acts, after the matter has once passed beyond their control there exists no power in the courts, by any of its processes, to act upon the officer so as to interfere with the exercise of that judgment while the matter is properly before him for action. The reason for this is, that the law reposes this discretion in him for that occasion, and not in the courts. The doctrine, therefore, is as applicable to

the writ of injunction as it is to the writ of mandamus.

In the one case the officer is required to abandon his right to exercise his personal judgment, and to substitute that of the court, by performing the act as it commands. In the other he is forbidden to do the act which his judgment and discretion tell him should be done. There can be no difference in the principle which forbids interference with the duties of these officers, whether it be by writ of mandamus or injunction.

Accordingly, in the case of *The State of Mississippi* v. *Johnson*, which was an application to this court for the writ of injunction, in the exercise of its original jurisdiction, the court says that it is unable to perceive that the fact that the relief asked is by injunction takes the case out of the general principles which forbid judicial interference with the exercise of executive discretion.

In the same case the Chief-Justice gives us this clear definition of a ministerial duty in the relation in which we have been considering it: "A ministerial duty, the performance of which may in proper cases be required of a head of a Department by judicial process, is one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under circumstances admitted or proved to exist and imposed by law."

* * * * * *

The numerous cases referred to by counsel, in which this court—after the title had passed from the United States, and the matter had ceased to be under the control of the Executive Department—has sustained the courts of justice in decreeing the equitable title to belong to the person against whom the Department had decided, are not in conflict with these views, but furnish an additional reason for refusing to interfere with such cases while they remain under such control.

In *French* v. *Fyan* (93 U. S., 169, 173), the controversy arose under the swamp land act of 1850. The Secretary of the Interior neglected or refused to do his duty in the premises, and it appeared that he had made no lists and "would issue no patents." The question thus arose whether he could be forced to do his duty in the premises as an inferior judicial tribunal may be forced to take up and decide some lawsuit which it has neglected. The court, speaking by Mr. Justice Miller, held that he could not be forced to do so; and for this reason justified a former decision in *Railroad Co.* v. *Smith* (9 Wall., 95), allowing litigants to prove title to swamp land by parol evidence when the Secretary unreasonably refused to act. The learned justice said:

> There was no means, as this court has decided, to compel him to act; and if the party claiming under the State in that case could not be permitted to prove that the land which the State had conveyed to him as swamp land was in fact such, a total failure of justice would occur, and the entire grant to the State might be defeated by this neglect or refusal of the Secretary to perform his duty. (*Gaines* v. *Thompson*, 7 Wall., 347; *Secretary* v. *McGarrahan*, 9 id., 298; *Litchfield* v. *The Register and Receiver*, id., 575.)

These remarks have been quoted with approval in *McCormick* v. *Hayes* (159 U. S., 332, 342).

When the doing of an act involves sufficient executive discretion to bar a writ of mandamus, it involves sufficient executive discretion to bar an injunction. This seems clearly to follow from the principle laid down in *Gaines* v. *Thompson*, supra, and is exemplified by other decisions of this court. The remedies are correlative.

A decision in favor of the swamp-land claimant would involve a question of documentary construction arising

upon various statutes and departmental records, and this is sufficient to invest it with the quality of executive discretion and bar direct interference of the courts.

The case of *Litchfield* v. *Register and Receiver* (9 Wall., 575) is directly in point. That case arose under the Des Moines River Improvement grant of 1846, and subsequent legislation *in pari materia*. Mr. Litchfield, the complainant, claimed under the grant. The legislation is set forth in many opinions of this court, among which we may refer to *Bullard* v. *Des Moines R. R.* (122 U. S., 167). Congress having granted alternative sections along the Des Moines River to the territory of Iowa in 1846 (p. 169), certain certifications were made by one of the Secretaries of the Treasury which, in a case to which Mr. Litchfield was a party, were held to be illegal (pp. 170–71). Congress thereafter, in 1862, granted to that State the whole of the territory in controversy, the title inuring to the benefit of *bona fide* purchasers from the State (pp. 171–2).

Mr. Litchfield, after this legislation, filed a bill in equity in the circuit court for the district of Iowa against the register and receiver of the land office at Fort Dodge, in that State, "asking an injunction to restrain them from entertaining and acting upon applications made to them to prove preemptions to certain lands which lay within the land district for which they were, respectively, register and receiver." (9 Wall., 576.) The bill set forth very fully the acts of Congress and of the State of Iowa, by which complainant maintained that the land in question through this grant had become his property. The grant has frequently been held to have been one *in præsenti*. (*United States* v. *Des Moines Navigation and Railway Company*, 142 U. S., 510.)

Mr. Litchfield thus sets forth a case very similar to that which is made by the present bill, if appellant's position upon the merits is correct: namely, a series of statutes and executive documents which showed him to be the legal owner of the premises through grants by the United States. His claim was the same: namely, that the bill "showed that the land officers were exceeding their authority and would give certificates of preemption and entry which would cloud and embarrass his title and that they should therefore be restrained" (p. 576). Nevertheless, the bill was dismissed on demurrer for want of equitable jurisdiction. The opinion is by Mr. Justice Miller, and is fatal to the present bill. We incorporate the opinion in full so far as relevant to the question now under consideration (pp. 577–578):

> The principle has been so repeatedly decided in this court that the judiciary can not interfere either by mandamus or injunction with executive officers, such as the respondents here, in the discharge of their official duties, unless those duties are of a character purely ministerial and involving no exercise of judgment or discretion, that it would seem to be useless to repeat it here. In the case of *Gaines* v. *Thompson*, decided at the last term of this court, the whole subject was fully considered and the cases in this court examined. The doctrine just stated was announced as the result of that examination. The case of *The Secretary* v. *McGarrahan*, of the present term, reaffirms the principle, which must now be considered as settled. Both these cases had reference to efforts similar to the present, to control the officers of the Land Department.
>
> It is insisted, however, by the complainant, that the present case does not come within the rule so

laid down, and his argument is plausible. A little consideration, however, will show that it is unsound.

The lands in controversy are situated within the land district over which these officers have authority to receive proof of preemption and grant certificate of entry. There are within that district, of course, lands open to sale and preemption. There would be no use for the land office if there were not. The very first duty which the register is called upon to perform, when an application is made to him to enter a tract of land, is to ascertain whether it is subject to entry. This depends upon a variety of circumstances. Has there been a proclamation offering it for sale? Has it been reserved by any action of Congress, or of the proper Department? Has it been granted by any act of Congress, or has it been sold already? These are all questions for him to decide, and they require the exercise of judgment and discretion. The bill shows on its face that these officers, in the exercise of this duty, were considering whether the reservations of the Departments and the acts of Congress, and the claim of the plaintiff under them, took these lands out of the category of lands subject to sale and preemption, and he asks the court to interfere by injunction to prevent them from determining that question, and that the court shall determine it for them. He says the court below erred because it did not require them to come in and answer to his claim of title, and at their own expense to put the court in possession of their views, and defend their instructions from the commissioner, and convert the contest before the Land Department into one before the court. This is precisely what this court has decided that no court shall do. After the land officers shall have disposed of the question, if any legal right of plaintiff has been invaded he may seek redress in the courts. He insists that he now has the legal title. If the Land Department finally decides in his favor, he is not injured. If they gave patents to the applicants for preemption, the courts can then

> in the appropriate proceeding determine who has the better title or right. To interfere now is to take from the officers of the Land Department the functions which the law confides to them and exercise them by the court.

The Litchfield Case thus applies to injunction suits the same rule which has already been thoroughly settled by decisions of this court upon mandamus proceedings, namely, that judicial process will not issue against officers of the coordinate executive branch of the Government when the point at issue involves the construction of ambiguous statutes or documents.

This ruling was first established in the well-known case of *Decatur* v. *Paulding* (14 Pet., 497), upon full discussion. Two justices dissented upon this point, but there has never been any dissent in the decisions which have followed it. The rule doubtless gives a narrower scope to the remedies of mandamus and injunction against executive officers than exists in some of the States, where these summary remedies are a favorite method for obtaining the settlement of difficult statutory problems. The limit to Federal jurisdiction in this matter is doubtless due to the very great contest made in *Kendall* v. *United States* (5 Cranch C. C., 163; 12 Pet., 524) against the power of Federal courts to issue writs enforceable only by contempt proceedings against high officers of a coordinate branch of the Government.

The protest of Postmaster-General Kendall and opinion of Attorney-General Butler upon this point will be found at 5 Cranch C. C., pp. 192–199, 221–225. While the dissenting justices in the Kendall case united with their brethren in overruling the Constitutional point (12 Pet., p. 626), nevertheless, doubtless prompted by considerations of comity, and out of respect to the preva-

lent theory of the mutual independence of the three branches of the Government, the court restricted their jurisdiction to narrow limits (pp. 611, 613, 614, 624).

The Decatur case came up two years later before the same nine justices; and it is noticeable that Chief Justice Taney, who filed an individual opinion in the first case, and spoke for a majority of the court in the second, had been the head of the Treasury Department as well as Attorney-General, while Mr. Justice Thompson, who spoke for the majority of the court in the first case, had been Secretary of the Navy, and Mr. Justice McLean, who filed an opinion in the second case, had been Postmaster-General and also Commissioner of the General Land Office. The Decatur Case turned upon the question whether an act could be enforced as ministerial when the statute directing its performance was ambiguous and involved the payment of money out of the public Treasury. Justices Story and McLean, while holding that Secretary Paulding had correctly interpreted the joint resolution under which Mrs. Decatur claimed a right in the navy pension fund, nevertheless said that the question of interpretation properly came up in a mandamus proceeding, the latter justice saying (14 Pet., 517):

> I differ from a majority of the judges, who hold that the construction of this resolution, giving to the relatrix a pension, is a duty in the discharge of which an executive discretion may be exercised. The law is directory and imperative, and admits of no discretion on the part of the Secretary.

Mr. Justice Baldwin was of the same opinion upon this point, and stated it very clearly (p. 606):

> If the right of the relator was in all other respects clear, except so far as they depended on the con-

> struction of the acts of Congress, the case was
> judicial cognizance only. The duty of a Secreta
> is not judicial; it is not his province to constr
> laws.

Mr. Justice Catron put his concurrence mainly on t
ground that the writ sought would force money out
the public Treasury, saying that the act directed in t
Kendall case "was no more an official act than t
making of an entry by a clerk by order of a court
justice," and adding: "Had it not been placed on th
narrow ground, the decision could not have been mad
(p. 521).

Chief Justice Taney's opinion was concurred in
five members of the court. He expressly refused
consider the true construction of the joint resolutio
saying (p. 517):

> As we have no jurisdiction over the acts of t
> Secretary in this respect, we forbear to expre
> any opinion upon the construction of the resoluti
> in question.

As one of the grounds for holding that the Secretar
in considering Mrs. Decatur's pension, was not acti
ministerially, he named the fact that it involved t
construction of ambiguous provisions, saying (p. 51

> He must have exercised his judgment upon th
> construction of the law and the resolution, an
> have made up his mind whether she was entitle
> under one only or both, and if he determined th
> she was entitled under the resolution as well
> the law, he must then have again exercised h
> judgment in deciding whether the half pay allowe
> her was to be calculated by the pay proper or th
> pay and emoluments of an officer of the comm
> dore's rank.

He also laid down the rule that presumptively the duties of Cabinet officers are executive, and not merely ministerial (p. 515):

> The duty required by the resolution was to be performed by him as the head of one of the Executive Departments of the Government in the ordinary discharge of his official duties. In general, such duties, whether imposed by act of Congress or by resolution, are not mere ministerial duties. The head of an Executive Department of the Government, in the administration of the various and important concerns of his office, is continually required to exercise judgment and discrestion. He must exercise his judgment in expounding the law and resolutions of Congress under which he is from time to time required to act. * * * If a suit should come before this court, which involved the construction of any of these laws, the court certainly would not be bound to adopt the construction given by the head of a department, and if they supposed his decision to be wrong they would, of course, so pronounce their judgment. But their judgment upon the construction of a law must be given in a case in which they have jurisdiction, and in which it is their duty to interpret the act of Congress in order to ascertain the rights of the parties in the cause before them.

It has been long settled in mandamus proceedings against executive officers that an act involving the construction of an ambiguous law is not ministerial but executive in nature, and therefore will not be controlled by the courts. (*Brashear* v. *Mason*, 6 How., 92, 102; *Reeside* v. *Walker*, 11 How., 272, 289; *United States* v. *Guthrie*, 17 How., 284, 304; *Carrick* v. *Lamar*, 116 U. S., 423, 426; *United States ex rel. Dunlap* v. *Black*, 128 U. S., 40; *United States* v. *Lynch*, 137 U. S., 280, 286;

Seymour v. *South Carolina*, 2 D. C. App., 240.) Thus it has been said that an act, although otherwise purely ministerial, will not be directed in a case of doubtful right (*Redfield* v. *Windom*, 137 U. S., 636, 644), and that the duty must be "clear and indisputable." (*International Contracting Co.* v. *Lamont*, 155 U. S. 303, 306.) That the same principles apply to the correlative remedy of injunction we have already shown by the Gaines and Litchfield cases, *supra*.

In *Seymour* v. *North Carolina*, *supra*, the court of appeals of the District of Columbia reviewed all of the decisions of this court in mandamus cases up to that time, and pointed out that since the Kendall case only two writs have been approved—one in *United States* v. *Schurz* (102 U. S., 378), where title to land having already indisputably passed out of the United States by execution of letters patent, the Secretary of the Interior was directed to perform the purely ministerial act of delivering the document; and second, in *Butterworth* v. *Hoe*, *supra*, where the Commissioner of Patents prepared his return for the purpose of excluding all discretionary elements from the case, and made it turn upon the question whether his decision was in any event reviewable by the Secretary of the Interior (112 U. S., at p. 53).

Many injunctions and writs of mandamus have been granted against State officials; but they are not in point, since the rule of *Decatur* v. *Paulding* is based on respect for a coordinate branch of the Government, while all branches are supreme over State officials within the Federal sphere of action. Writs of mandamus against court officers rest upon a principle of

their own, being merely incidental to the proper conduct of judicial business and ancillary to other litigation.

Up to the year 1893 we are unable to find the affirmance of a single injunction against a Federal officer upon the records of this court, except, under special statutory provisions to that end (now Rev. Stat., par. 3636), in *United States* v. *Nourse*, 9 Pet., 7. Other applications had failed for various reasons. (*Litchfield's Case, supra; Snyder* v. *Marks*, 109 U. S., 189.)

In 1893 came the case of *Noble* v. *Union River Logging R. R. Co.* (147 U. S., 165), upon which complainant relies. It is somewhat noteworthy that counsel in charge of the appellant's interests made no contest as to the right to enjoin. Either because the Department desired a definite ruling from this court upon the other questions, or for other reason, he simply argued the case upon the merits precisely as it had presented itself to the Secretary.

It is submitted that the Noble Case, if it were clearly in point, is not to be given as much weight as if this question had been raised by counsel, and that it is not to be regarded as a conclusive authority upon suits to remove a cloud upon title. (See *Chase* v. *United States*, 155 U. S., 489, especially pp. 494, 495.)

Upon the present point, however, the Noble Case is not against the position here taken. Nothing in the opinion indicates an intent to overrule the distinction between executive and ministerial acts. This distinction is set forth in the opinion, Mr. Justice Brown saying (p. 171):

> That with respect to the former there exists and can exist no power to control the executive discretion, however erroneous its exercise may seem

> to have been; but with respect to ministerial duties, an act or refusal to act is or may become the subject of review by the courts. * * * Indeed, the reports of this court abound with authorities to the same effect (citing cases). In all these cases the distinction between judicial and ministerial acts is commented upon and enforced.

The statute upon which the case turned contained no ambiguity. The question there was whether the approval of a profile by the Secretary of the Interior was sufficient to pass title, or whether a patent was necessary. The act in question (March 3, 1875, c. 152, par. 4) made no reference to any patent, but provided that the company should "file with the register of the land office for the district where such land is located a profile of its road; and upon approval thereof by the Secretary of the Interior, the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way." All the judges before whom the question was brought were unanimous in their opinion upon it.

In the present case the statute expressly requires a patent; and four learned and careful judges, who have heard full argument upon the question, have already declared the approval of the swamp-land list insufficient to transfer title, and that the question is one still pending in the Interior Department. Assuming that there may be great force in the appellant's contention, nevertheless the opinions of these four judges would seem sufficient by themselves to prove the statute sufficiently ambiguous to defeat any claim that the Secretary's duty after such approval was ministerial only, or that

the revocation and cancellation of the list was in violation of an unambiguous law. (*Lochren* v. *Long*, 6 D. C. App., 486, 505.)

Respectfully submitted.

WILLIS VAN DEVANTER,
Assistant Attorney-General.

courts of the District of Columbia to assert his rights as against a proceeding in the land department, or when that department refuses to act at all, yet, as a general rule, power is vested in the department to determine all questions of equitable right and title, upon proper notice to the parties interested, and the courts should be resorted to only when the legal title has passed from the Government.

On May 10, 1898, the appellant, as plaintiff, filed in the Supreme Court of the District of Columbia his bill, setting forth, besides certain jurisdictional matters, the Swamp Land Act of September 28, 1850, c. 84, 9 Stat. 519; the extension of that act to all the States by the act of March 12, 1860, c. 5, 12 Stat. 3; a selection of lands thereunder by the State of Oregon (evidenced by what is called "List No. 5,") and an approval on September 16, 1882, of that selection by the Secretary of the Interior; a purchase in 1880 from the State by H. C. Owen, of certain of those selected lands, and subsequent conveyances thereof to plaintiff. Then, after showing the appointment of Hon. William F. Vilas, as Secretary of the Interior, the bill proceeds:

"That, as plaintiff is informed and believes, on the 27th day of December, A.D. 1888, the said Secretary of the Interior, then the said William F. Vilas, made and entered an order annulling, cancelling and revoking the said 'List number 5,' and the approval thereof, and annulling and revoking the said judgment and determination so made by his said predecessor in said office, the said Henry M. Teller, whereby his said predecessor had adjudged and determined that the lands aforesaid were swamp and overflowed lands within the meaning of the acts aforesaid, and made and entered an order purporting to adjudge and determine that certain of the lands described in said 'List number 5,' including the lands hereinbefore described, were not swamp and overflowed lands within the meaning of the acts aforesaid.

"That thereafter, as plaintiff is informed and believes, divers proceedings were taken before the said Secretary of the Interior and in the general land office of the United States by the State of Oregon and by the grantors of this plaintiff to set aside and have held for naught the orders and rulings so made

by the said William F. Vilas as such Secretary of the Interior, which proceedings came to an end within one year last past.

"That, as plaintiff is informed and believes, since the said proceedings last aforesaid came to an end, the defendant, as such Secretary of the Interior, is proceeding to put in force and to carry out the orders and rulings so as aforesaid made by the said William F. Vilas as such Secretary of the Interior and to hold the lands hereinbefore described to be public lands of the United States and subject to entry under the laws of the United States, and threatens and intends to receive and permit the officers of the land department of the United States to receive applications for and allow entries of the lands aforesaid as public lands of the United States."

After alleging the invalidity of these proceedings, the bill goes on to aver that the proceeding thus initiated by Secretary Vilas throws a cloud upon appellant's title, "and is likely to cause many persons to attempt to settle upon the said lands and to enter the same in the land department of the United States as public lands of the United States subject to such entry, and that plaintiff will be unable to remove such persons from said lands or to quiet his title thereto as against them without a multiplicity of suits, and that therefore this plaintiff is entitled in this court to an order enjoining and restraining the defendant, as such Secretary of the Interior, and his subordinate officers of the land department of the United States, from in any way carrying said last mentioned orders and rulings into effect, and from permitting any entries upon said lands or holding the same open to entry, and from in any way interfering with or embarrassing the plaintiff in his title and ownership of the lands aforesaid."

Upon these facts plaintiff prayed a decree cancelling the order of December 27, 1888, restraining the officers of the land department from carrying it into effect, and forbidding the defendant and his subordinates from holding the lands to be public lands of the United States or subject to entry under the general land laws. To this bill a demurrer was filed, which was sustained, and the bill dismissed. Plaintiff appealed to the Court of Appeals of the District, and upon an affirmance

of the decree by that court brought the decision here for review.

Mr. W. B. Treadwell for appellant. *Mr. Charles A. Keigwin* was on his brief.

Mr. Assistant Attorney General Van Devanter for appellee.

Mr. Justice Brewer, after stating the case, delivered the opinion of the court.

Under the Swamp Land Act the legal title passes only on delivery of the patent. So the statute in terms declares. The second section provides that the Secretary of the Interior, "at the request of said Governor [the Governor of the State,] cause a patent to be issued to the State therefor; and on that patent, the fee simple to said lands shall vest in the said State." *Rogers Locomotive Works* v. *American Emigrant Company*, 164 U. S. 559, 574; *Michigan Land & Lumber Co.* v. *Rust*, 168 U. S. 589, 592.

In this case the record discloses no patent, and therefore no passing of the legal title. Whatever equitable rights or title may have vested in the State, the legal title remained in the United States.

Until the legal title to public land passes from the Government, inquiry as to all equitable rights comes within the cognizance of the land department. In *United States* v. *Schurz*, 102 U. S. 378, 396, which was an application for a mandamus to compel the delivery of a patent, it was said:

"Congress has also enacted a system of laws by which rights to these lands may be acquired, and the title of the Government conveyed to the citizen. This court has, with a strong hand, upheld the doctrine that so long as the legal title to these lands remained in the United States, and the proceedings for acquiring it were as yet *in fieri*, the courts would not interfere to control the exercise of the power thus vested in that tribunal. To that doctrine we still adhere."

While a delivery of the patent was ordered, yet that was so

ordered because it appeared that the patent had been duly executed, countersigned and recorded in the proper land records of the land department and transmitted to the local land office for delivery, and it was held that the mere manual delivery was not necessary to pass the title, but that the execution and record of the patent were sufficient. And yet from that conclusion Chief Justice Waite and Mr. Justice Swayne dissented. The dissent announced by the Chief Justice only emphasizes the proposition laid down in the opinion, as heretofore quoted, that so long as the legal title remains in the Government all questions of right should be solved by appeal to the land department and not to the courts. See in support of this general proposition *Michigan Land & Lumber Co.* v. *Rust*, *supra*, (which, like the present case, arose under the Swamp Land Act,) and cases cited in the opinion. Indeed, it may be observed that the argument in behalf of appellant was avowedly made to secure a modification of that opinion. We might well have disposed of this case by a simple reference to that decision; but in view of the earnest challenge by counsel for appellant of the views therein expressed, we have reëxamined the question in the light of that argument and the authorities cited. And after such reëxamination we see no reason to change, but on the contrary we reaffirm the decision in *Michigan Land & Lumber Co.* v. *Rust*. As a general rule no mere matter of administration in the various Executive Departments of the Government can, pending such administration, be taken away from such Departments and carried into the courts; those Departments must be permitted to proceed to the final accomplishment of all matters pending before them, and only after that disposition may the courts be invoked to inquire whether the outcome is in accord with the laws of the United States. When the legal title to these lands shall have been vested in the State of Oregon, or in some individual claiming a right superior to that of the State, then is inquiry permissible in the courts, and that inquiry will appropriately be had in the courts of Oregon, state or Federal.

We do not mean to say that cases may not arise in which a party is justified in coming into the courts of the District to

assert his rights as against a proceeding in the land department or when the department refuses to act at all. *United States* v. *Schurz*, *supra*, and *Noble* v. *Union River Logging Railroad Co.*, 147 U. S. 165, are illustrative of these exceptional cases.

Neither do we affirm that the administrative right of the departments in reference to proceedings before them justifies action without notice to parties interested, any more than the power of a court to determine legal and equitable rights permits action without notice to parties interested.

"The power of supervision and correction is not an unlimited or an arbitrary power. It can be exerted only when the entry was made upon false testimony or without authority of law. It cannot be exercised so as to deprive any person of land lawfully entered and paid for. By such entry and payment the purchaser secures a vested interest in the property and a right to a patent therefor, and can no more be deprived of it by order of the Commissioner than he can be deprived by such order of any other lawfully acquired property. Any attempted deprivation in that way of such interest will be corrected whenever the matter is presented so that the judiciary can act upon it." *Cornelius* v. *Kessel*, 128 U. S. 456, 461. "The Government holds the legal title in trust for him, and he may not be dispossessed of his equitable rights without due process of law. Due process in such case implies notice and a hearing. But this does not require that the hearing must be in the courts, or forbid an inquiry and determination in the land department." *Orchard* v. *Alexander*, 157 U. S. 372, 383.

But what we do affirm and reiterate is that power is vested in the Departments to determine all questions of equitable right or title, upon proper notice to the parties interested, and that the courts must, as a general rule, be resorted to only when the legal title has passed from the Government. When it has so passed the litigation will proceed, as it generally ought to proceed, in the locality where the property is situate, and not here, where the administrative functions of the Government are carried on.

In the case before us there is nothing to show that proper

notice was not given; that all parties in interest were not fully heard, or that the adjudication of the administrative department of the Government was not justified by the facts as presented. The naked proposition upon which the plaintiff relies is that upon the creation of an equitable right or title in the State the power of the land department to inquire into the validity of that right or title ceases. That proposition cannot be sustained. Whatever rights, equitable or otherwise, may have passed to the State by the approval of List No. 5 by Secretary Teller, can be determined, and should be determined, in the courts of Oregon, state or Federal, after the legal title has passed from the Government. The decree of the Supreme Court of the District of Columbia, sustained by the opinion of the Court of Appeals of the District, was right, and is

Affirmed.

MR. JUSTICE MCKENNA took no part in the consideration and decision of this case.

BROWN *v.* HITCHCOCK.[1]

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 581. Argued February 23, 24, 1899. — Decided April 3, 1899.

Under the act of September 28, 1850, c. 84, 9 Stat. 519, known as the Swamp Land Act, the legal title to land passes only on delivery of a patent, and as the record in this case discloses no patent, there was no passing of the legal title from the United States, whatever equitable rights may have vested. Until the legal title to land passes from the Government, inquiry as to all equitable rights comes within the cognizance of the land department.

Although cases may arise in which a party is justified in coming into the

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[1] The docket title of the case is *Brown* v. *Bliss*. Mr. Bliss having resigned as Secretary of the Interior, his successor was substituted in his place.